VOLUME VIII

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

No. 15242

United States
Court of Appeals
for the Ninth Circuit

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER. Trustee,

Appellees.

Transcript of Record
In 9 Volumes

Volume VIII
(Pages 3255 to 3614)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

The Court: All right. 4 is rejected.

5? This is similar to 4. There will be the same objections. I am proposing to reject it and the same objections would apply.

Mr. Fowle: That's right.

The Court: Reject 5. 6? Are the defendants satisfied with it?

Mr. Fowle: We have, I think, a couple of modifications. In line 13, insert the word "actual" before the word "movement," and in line 18, insert the word "actual" before the word "marketing."

The Court: Well, in going over it, I have done this. Maybe this will satisfy you. Line 12, it says, "in some appreciable fashion restrained or affected interstate commerce in citrus fruit juices," and I have struck out "movement." [4034]

Mr. Fowle: I think that is satisfactory.

Mr. Dixon: What is that, Judge?

The Court: After the word "restrained," make it "or affected interstate commerce in interstate fruit juices." Strike out "in interstate commerce," again.

Mr. Williams: What is the difference between "appreciable effect" and "appreciable restraint"?

This gets into the question raised in the Las Vegas case of intrastate affecting interstate.

The Court: I don't think that point is raised.

Mr. Williams: I can see appreciable effect. Is there any distinction between appreciable effect and the appreciable restraint? The language of the cases is "appreciable restraint." So it seems to me the

words "appreciable effect" should be omitted. It should be solely appreciable restraint.

The Court: What is your view, Mr. Dixon?

Mr. Dixon: I disagree, your Honor, with everything in this instruction after the first sentence. It implies that if the jury would find that the plaintiff was injured as the result of the alleged acts, even though it put him out of business, that the plaintiff would not have a case, which is not the law, in my judgment. If that doesn't make a case, if I am stopped there, then we have been wasting a terrific amount of time.

The next part of it attempts to deal with harm to the [4035] general public in the form of an undue restriction upon trade and commerce. The harm to the public can come, as I have suggested, from a fixing of prices or interference with the price structure here, which is illegal per se. The harm to the public can come from the contracts with Hyland Stanford, which were entered into admittedly in this case, and which tied up the processing facilities of those companies to the exclusive use of the defendants insofar as the first call on their facilities was concerned.

In other words, after the first sentence here, the defendants are asking the court to instruct the jury on something that is restricted and limited in its scope.

I assume the purpose of this is to inject the public interest or injury requirement of the case into the charge somewhere. If that is the purpose of it, then I think it is entirely improper, because the public

injury does not have to be the one that causes the plaintiff damage. That is my objection to this instruction.

In other words, the public injury here can come from the elimination of the plaintiff as a competitor in interstate commerce, and where you have got the volume of commerce here, and it isn't in dispute, that the plaintiff sold over a million and a half dollars' worth of products, a substantial part of which was in commerce, if the elimination of that amount of competition doesn't constitute a public injury, assuming [4036] nothing else, then we have been wasting our time in this case.

But let's assume the jury felt that was not a public injury, certainly the others, the fixing of prices, the tying up of facilities, under Section 2 would constitute sufficient public injury, certainly, to make a clear valid case for the Government, for example, if it was presenting it solely on the ground that all that was required to be shown here was the establishment of public injury.

So this instruction, in my judgment, which says, "If you find from the evidence that the plaintiff alone was injured from whatever cause, including of course, the combination and conspiracy charged in this complaint, that you cannot find for the plaintiff,"—well, now, if that is the law, we have been wasting our time.

Mr. Fowle: Well, we think we have been wasting our time, Mr. Dixon.

Mr. Dixon: I know you do, but I don't think I have.

The Court: Is this your public injury instruction?

Mr. Fowle: Yes, sir, this is the public injury instruction. That is certainly what it is. [4037]

The Court: Well, I think you are going to have to revise it.

You can work tonight on it and submit another one.

Let me say two or three things.

First, your last sentence is argumentative.

Mr. Fowle: I don't see just wherein it is argumentative.

The Court: It is argumentative, and it also uses this language about "verdict for the defendants."

I am trying to get away, in both sets of instructions, from saying "verdict for the plaintiffs" or "verdict for the defendants."

Secondly, I agree with Mr. Dixon that this language about injury to the plaintiff alone is not correct. [4038]

* * *

Do I understand, number one, that you think it is the law that the question of public injury is a question of law for the court, and the court can remove that question from the jury?

Mr. Dixon: That is my view, your Honor.

The Court: Number two, do you think, also, that an instruction that says, If you find that the plaintiff has been injured by reason of the things charged in the complaint, that there automatically follows that there was a public injury?

Mr. Dixon: There would have to be.

The Court: You would go along with either one of those?

Mr. Dixon: Yes. [4043]

The Court: It is pretty hard for me to see how you leave to the jury the question of public injury. That definitely is a legal question.

How do you leave to the jury a question, under antitrust law, as to whether there was a public injury? It is a question of law.

Mr. Fowle: If the court please——

The Court: Whether you should go as far as to say, "I instruct you that there was a public injury here"——

Mr. Dixon: No.

The Court: ——as contrasted with saying, "I instruct you that if you find that the plaintiff has been damaged as alleged in the complaint, then it follows that there is automatically a public injury" —I would prefer the latter of the two.

Mr. Fowle: The evidence in this case, as distinguished from the charge in the complaint, indicates at the very most some sort—taking it in the light most favorable to the plaintiff—indicates some sort of a plot to get rid of the Winckler-Smith Company.

There is no evidence here that any other commerce or any other competition was in any way affected by the supposed misconduct of the defendants.

Now, even after the disappearance from the scene of Mr. Winckler, of the Winckler-Smith Company, as a competitor [4044] here, if every-

thing moved on the same, if the market for citrus juice products was exactly the same as it would have been whether he was here or not, if exactly the same amount of citrus fruit juice flowed into the market, if the prices weren't tampered with, if really nothing happened to the flow in interstate commerce of citrus juice products, we say that there wasn't any public injury. [4045]

Now, that isn't to say that Mr. Winckler, or Winckler-Smith, might not have a cause of action on some other ground, on some other basis, against the defendants for putting him out of business. He might have. But it wouldn't be a violation of the antitrust laws, because the public interest would not have been affected.

That is our position.

The Court: No. 1, I take it that it is the purpose of the antitrust laws, generally, that there be competition, on the theory that competition is good; and it is all these things that flow from the lessening of competition that the antitrust laws are directed at.

If you followed your view, then a defendant might proceed to eliminate one competitor at a time, and not thereafter make any change in the price structure, then he might even wait until any questions on the statute of limitations had run; he had run all his competitors out of business, and then he would say, Bingo, here we go, boys. And then where are you?

Mr. Fowle: That doesn't follow from the proposition that I have urged, because I am saying if the

competitive situation and commerce in citrus fruit juices continues to be the same. You are assuming that it is chopped off little by little.

The Court: I am just assuming that a competitor is [4046] chopped off. Then I assume that he chops off another one. But he doesn't tamper with the prices thereafter. I am giving you an extreme situation. So he gets rid of all of them. Then to be doubly sure, he waits a three-year period, so there are not going to be any complaints against him. He has meanwhile run his competitors out of business, and then he goes to town. Do you think that is contemplated under the antitrust laws?

Mr. Fowle: No, I do not.

The Court: Let me hear Mr. Dixon's views on it. He can probably more accurately express his views.

Mr. Dixon: I was looking—I can't find it offhand—for a statement frequently quoted in these cases, that it is the purpose of the Sherman Act to foster and promote competition, as well as to preserve it. Therefore, any action which prevents even the coming into a business of competition, the elimination of it after it is there, or the creation of a monopoly which prevents any further competition after it has been eliminated, constitutes a violation of the Sherman Act without more. I mean a showing to that effect violates the antitrust laws.

And that is the purpose and function of them; to preserve and maintain our free enterprise or our competitive system.

Therefore, anything which tends to eliminate it,

as expressed in the Clayton Act, which gets at them in the [4047] incipiency, before they can throttle competition and create a monopoly, is made illegal, the Sherman Act reaches acts, also, in their incipient stage where they relate to the formation of a conspiracy to restrain commerce, even before it has become effective, and the actual performance of acts under and pursuant to conspiracy after it has been organized.

In other words, every phase of our business operations at which competition can be throttled, prevented, eliminated, and monopolies created, is dealt with in the Sherman Act. And any act or any elimination of a competitor, therefore, such as the plaintiff in the instant case, by any acts which can be said to stem from the defendants, which are part of a combination or conspiracy to restrain trade or commerce in citrus juices, or to monopolize citrus juices—I am referring to those that are processed here in California and sold in interstate commerce—constitutes a violation of the Sherman Act.

So that this Instruction 6, which the defendants are contending for, which is based on the Shotkin case, has absolutely no application either to the Second Amended Complaint now before the court, and under which this case is to go to the jury, or the evidence which has been presented to the jury pursuant to that Complaint.

For that reason, I stated at the outset that I objected to anything in Instruction 6 after the first [4048] sentence.

The Court: I will tell you what we will do. I am tired, and I suppose you all are. And I know, speaking for Mr. Fisher and myself, and Mr. Walker, this antitrust business is pretty difficult to follow. These three fellows over here——

Mr. Fowle: Speak for me, too.

The Court: ——they can glibly give you an argument and cite you authorities and quote from cases.

Are you an antitrust expert?

Mr. Fowle: I wouldn't say so.

The Court: You have been doing pretty well, I will say that for you.

If you were not one before you started this case, you will be before you get through with this case.

Why don't the defendants do this? Look over your instruction, if this is the one you offer on public injury, and see if you are satisfied that this is the one that you want to offer. And I would like to have one along the line that you suggest, and we will jump into public injury the first thing tomorrow morning.

Mr. Dixon: I attempted to answer this by saying that I don't think this is any matter on which the court should instruct or be required to instruct.

The Court: I think we should go at least as far as to [4049] say that if you find that the plaintiff has been damaged as charged in the complaint——

Mr. Dixon: But that is the general charge of causation.

The Court: I want something suggested on that general charge, then.

If you don't have a stenographer, write it out and my stenographer can type it the first thing tomorrow morning.

Mr. Fowle: One of the difficulties here is that I take it Mr. Dixon is really contending that there is no such rule as we find in the Shotkin case and some other cases, that injury to the plaintiff alone is not enough, that there must be public injury.

The Court: There must be facts from which it can be determined that there was a public injury. My law clerk, I think, put his finger right on it.

Mr. Fowle: That is, of course, talking about the pleading. But after the evidence is in there must be facts, too, from which it can be determined.

The Court: You and I are just in disagreement, because I think there are such facts, if the jury wants to find them.

Mr. Fowle: Other than the injury to the plaintiff?

The Court: I think the elimination of the plaintiff as a competitor in citrus juice is the public injury. And I distinguish it from these dealer cases where the man eliminated wasn't competing with the person he sued. And [4050] the case Sugarman tried—was it Sugarman? In the Interborough News case—Sugarman, yes, there the thing turned—I don't know whether it was said in so many words, but it turned on the fact that these people who were really sued were not the people that were competing with the fellow.

Mr. Dixon: That is why there was no elimination of competition. There was no elimination of

competition in the Shotkin case, and the other cases. And if there was no elimination of competition, then I would agree there could be no public injury.

The Court: What time do you want to come down in the morning?

The Clerk: Judge, could we get on the record the admission of this final exhibit here? Mr. Fisher thinks we ought to get it admitted before Tuesday morning.

The Court: What have you got? [4051]

Mr. Fisher: You will remember that as to Plaintiffs' Exhibit 84, I believe it was, we elected to have the petition for leave to present the third modified arrangement in the Chapter XI proceeding and the order confirming that arrangement substituted——

The Clerk: Added, I believe.

The Court: Well, one or the other. What do you want to do? Substitute?

Mr. Fisher: Substitute.

The Court: Do you have any objection?

Mr. Dixon: No.

The Court: Do you have it sorted out?

Mr. Fisher: Yes.

The Court: It can be substituted in place of 84.

The Clerk: 84 is stricken from the evidence, then?

The Court: 84 is the same as this except that the defendants——

Mr. Fisher: One is the order and one is the petition.

The Court: They will be together.

The Clerk: Then is 84 to be withdrawn?

Mr. Fisher: Yes.

Mr. Dixon: And this substituted.

The Clerk: Then I am to substitute this and give the original 84 back to Mr. Dixon and take it clear out of the record. [4052]

Mr. Fisher: That is true.

The Court: No. Let the present 84 be called 84-A and marked for identification.

The Clerk: You told the jury this would be 84.

Mr. Fisher: It was to be substituted.

The Clerk: You said the form hadn't been decided.

The Court: Then call this one 84-A and use 84 for identification only and withdraw it from evidence, and then the record will be clear. [4053]

* * *

Saturday, February 4, 1956—9:00 A.M.

The Court: Did you submit anything on your idea of public injury, Mr. Dixon?

Mr. Dixon: Your Honor, I checked the law and the cases last night, and my position is as it was before we discussed the matter. There is nothing in the statute which relates in any way, or makes it a requirement to show any public injury. Section 7 of the statute is clear in that respect.

The only time this question of public injury has been raised, to my knowledge, has been when the defendants in an action for treble damages seek to test the complaint or the sufficiency of the com-

plaint by claiming that the facts alleged therein do not constitute or show any public injury. That is the ruling of all the cases, and that is the only manner in which this problem has been presented on the basis of the cases which I have, which I will be glad to let your Honor see on this question, if you are interested.

The Court: Well, I am in accord with what you say from the check I made.

Mr. Dixon: Furthermore, I have checked some charges to the jury on this question, and no one of them that I have checked has shown any reference to any requirement or a showing to the satisfaction of the jury that there be any public injury [4055] shown.

For example, in the cranberry case, which is quoted on one point by the defendants, and which I think represents generally a pretty good charge on the question, if you will search it, read it, as I did, you will find no reference anywhere in the charge to any public injury being required to be shown by the plaintiff as part of his cause of action. There is nothing in the statute requiring it. The statute merely provides that the plaintiff in a treble damage action under Section 7 must show that injury resulted from a violation of the antitrust laws, and that has always been my understanding of the law from the charges that I have checked in private suits on that matter.

So it is certainly not in my opinion any question to be submitted to the jury. It would indeed be an

anomalous situation if the jury were to have to determine what constituted public injury.

So that, to answer your question, I have prepared no instruction on that question, because I don't believe it is a matter upon which any instruction should be given by the court. In other words, if this court is satisfied on the basis of the pleadings and on the basis of the evidence that there has been sufficient evidence and allegations contained in the complaint to establish the existence of public injury, if proved and if believed, that is the end of the public injury question. [4056]

I said that all the cases that I have checked, the Shotkin case and all the rest of them, never got beyond a motion to dismiss the complaint. That was the circumstance under which all of those motions were made and the claim made that the complaint was insufficient because it didn't allege public injury, and then the cases go on to indicate, of course, that is a matter of law certainly upon which the court can determine whether the allegations of the complaint are sufficient, if proved, to establish the existence of public injury.

The Court: I was trying to recall whether or not the jury have been told anything about public injury.

Mr. Dixon: I don't think so, your Honor, from my memory.

The Court: How about the opening statement of Hurd?

Mr. Williams: Well, I don't recall it was mentioned.

Mr. Dixon: I don't believe he said a word about it. I don't think he should have. I don't think it is a proper matter for comment in the sense that it is a requirement, your Honor. [4057]

The Court: And then you wouldn't even suggest an instruction that if the case of the plaintiffs is proved to the satisfaction of the jury, that the court instructs them that there is public injury?

Mr. Dixon: No.

The Court: It doesn't add anything?

Mr. Dixon: No, it doesn't add anything. The basis of a private lawsuit is the damage resulting from the violation of the law, of the antitrust laws, and if this complaint, if proved, does not state a violation, then we should have been dismissed at the start of this case; there should never have been any evidence taken on it.

The Court: I hadn't thought about that angle of it, about no instruction at all. But my own view was that it was one of law, and that is in accord with your view. It is just a matter of procedure how to handle it.

Mr. Dixon: In other words, your Honor must, of course, charge on the necessary elements of a cause of action for the plaintiff in a treble damage action, show that the defendants have violated the antitrust laws, and that the plaintiff has suffered injury or damage as a result of some of the acts done pursuant to such violation. That was Judge Wyzanski's charge in the cranberry case, and I think the charge is very good.

The Court: I propose, then, to give no instruc-

tion on [4058] public injury, and to reject defendant's 6, you may make your record on that.

Mr. Williams: I would like to state our objection to your Honor's proposal: That this case has charged an injury to the plaintiff, and we have maintained all along that it failed to state a cause of action because it did not charge any injury to the public, in addition to injury to the plaintiff. We feel that the cases, Shotkin, Fedderson, and so forth, cannot be distinguished on the basis that was discussed last night, that is, that the plaintiff was not a competitor of the defendants, because in those cases you still had a suppression of competition by the plaintiff going out of business, between the plaintiff and the plaintiff's competitors; and the Sherman Act has never distinguished between a suppression of competition at one level and at another level. They are both equally unlawful.

If the cases are correct that there is a requirement for a public injury, in addition to injury to the plaintiff, then they become meaningless if the mere proof of injury to the plaintiff constitutes also proof of injury to the public. Because every injury to a plaintiff's business necessarily hampers his ability to compete in one way or another, and there would be no necessity for the rule of public injury.

So our position is that the question should be submitted to the jury as one of fact. [4059]

The Court: I don't think it is one of fact. I think it is one of law.

Mr. Fowle: I take it, also, your Honor, that you

would refuse any instruction on the subject of public injury?

The Court: Any instruction as a matter of fact, and probably as a matter of law. As a matter of law, however, I would instruct, if you would waive that question, I would instruct that if the plaintiff proved the things charged in the complaint, and if there was damage to the plaintiff, that public injury necessarily followed.

But I don't think it is necessary to instruct if it is a matter of law.

Mr. Fowle: I just wanted to be sure——

The Court: I am not objecting to the particular form or language of your instruction.

Mr. Fowle: That is what I meant. We have a number of alternatives, but I see no purpose to be served in dealing with alternatives if each one of those raises the problem as a question of fact.

The Court: Nor do I.

I reject No. 6. That is, defendants' 6.

Defendants' 7.

The defendants, first, are satisfied with the form of it?

Mr. Fowle: There is one slight change that I think I [4060] would suggest. In line 21 after the words "specific things," I would put in a comma and a phrase, "or one or more of them comma."

The Court: I noticed that, too.

Mr. Fowle: Also, your Honor, as an alternative to this, in view of your Honor's rulings up to date, with respect to the capability of the three co-operatives to combine and conspire among themselves, I

think as an alternative, although we would like to submit this as it is, as an alternative we would be willing to submit one which in that portion of the instruction from line 18 down simply stated that Sunkist, Exchange Orange, Exchange Lemon, Tree-Sweet, or Silzle, rather than separate the five into two categories.

The Court: I noticed that, too. In other words, this is not consistent with the other instructions that I have given. You already have your point on that.

Mr. Fowle: Correct.

The Court: You will not be waiving that point if we modify this particular paragraph.

One other thing. I don't like this language on what is actually charged, and I would suggest that you put a comma after "plaintiff" on line 11, that is, drop down to say 13, "that the defendants and the alleged co-conspirators conspired," and so forth.

It is just a matter of form. [4061]

Mr. Fowle: I am not quite sure I follow that. How much did you propose omitting?

The Court: I would suggest after the word "plaintiff" on line 11, you put a comma, and then strike out "what is actually charged * * * in view of the evidence in this case is that" and then put in, "i.e.," so that it will read, beginning with 11, "with resultant injury and damage to the plaintiff, i.e., that the defendants and alleged coconspirators combined and conspired to eliminate," and so forth. It is just a matter of form.

Mr. Fowle: All right.

The Court: Now, before we butcher it up too much, let's find out what the plaintiff's objections are. Some of this, I think, would be proper.

Mr. Dixon: Well, our general objection, of course, is that certain things should be added apart from the other one we previously discussed, so I will take those up first. On line 6, after the word "other," the words "at a date unknown to plaintiff" should be inserted.

The Court: Wait a minute. What is that?

Mr. Dixon: "At a time or date unknown to plaintiff." In other words, this conspiracy isn't particularly one that was necessarily formed in 1951. It had been going on here for three years insofar as TreeSweet was concerned, or five years. [4062]

Mr. Fowle: We would have no objection to that insertion.

The Court: All right.

Mr. Dixon: The word "for" in line 8 should be stricken, and the word "with" put in.

The Court: "With" in place of "for"?

Mr. Dixon: Yes.

The Court: Does that make any difference?

Mr. Dixon: I think it is more in line with the general allegations, your Honor. I agree it is a small change.

Mr. Fowle: I think I took this language right out of the amended complaint, but I don't think it makes much difference.

The Court: I don't think it makes any difference.

Mr. Dixon: I won't argue.

The Court: Put "with" in, and what else?

Mr. Dixon: After the word "juice" in line 9, I think should be inserted "particularly single-strength Valencia orange juice."

Mr. Fowle: I don't think that phrase is in the allegations of the first cause of action.

Mr. Dixon: It should be changed to "juices," too.

The Court: They don't have it in the first cause.

Mr. Dixon: I thought it was in all of them, your Honor, and it certainly relates to all of them. I think it should [4063] be. I am certain it is in the first cause of action somewhere. I will have to read the complaint here.

The Court: Are you looking for the complaint?

Mr. Dixon: Yes.

Mr. Fowle: I take it, your Honor, apart from whether this is in the complaint or not, it is not necessary for us to urge the point that we believe the charge here should deal with one thing or the other, that is to say, it should deal with citrus fruit juices, or single-strength Valencia orange juice, but not with one and particularly with the other. That is a point that we made yesterday, and I don't believe we would want to go ahead and urge it every time it might arise, if it is understood that we are urging it.

The Court: No. I think we can have an understanding where these points have been made that are general and go to various instructions, they can be incorporated by reference without being

specifically mentioned as to each instruction. There has got to be some consisteney here.

Mr. Dixon: Paragraph II(b) of the complaint, and the citrus industry in Paragraph V(b) and V(d).

The Court: It isn't in those other places, but it is in V(d). Well, here is my view of that. We won't waste any more time on that point. The gist of this instruction is that you want an instruction throwing the plaintiff out unless he has proved certain things and, therefore, I think you [4064] have to take the broadest scope of the plaintiff's claims, or you can't ask me to throw the plaintiff out. In fact, you might have error in the instruction if you had an instruction that plaintiff be thrown out unless he proves particular things. In other words, it would have to be broad enough to cover plaintiff's contentions, and although actually in the particular paragraph of Section 1, it doesn't appear, it does appear inferentially throughout.

Mr. Fowle: I thought, your Honor, by using the term canned citrus fruit juice—I am willing to put that in the plural, "juices"—I had made it as broad as you could make it.

The Court: I am going to insert, and you can object to that part, "particularly single-strength orange juice" on line 9.

Mr. Walker: Make it Valencia orange juice?

The Court: Yes. What else?

Mr. Dixon: On line 13, the word "defendants," I think, should be inserted "Sunkist and EOP."

The Court: That doesn't make a lot of difference. What is your thought on that?

Mr. Fowle: Well, I would——

The Court: I am asking Mr. Dixon's thought. It doesn't make a lot of difference.

Mr. Dixon: It isn't too important, I presume, your Honor, [4065] except that, and this is only personal opinion, it would follow the general practice I have of drawing instructions, that I name the defendants in a conspiracy instruction, because they have to be pointed out, particularly if they are referring to co-conspirators later, to distinguish them. But that isn't too important.

Mr. Fowle: We would be perfectly willing to have the defendants identified at that point if the alleged coconspirators are also identified at that point.

The Court: I think we are wasting time on this.

Mr. Fowle: I think it should be both or none.

Mr. Dixon: I don't care, Judge.

The Court: I am going to change "defendants" to "Sunkist and Exchange Orange Products."

Mr. Dixon: Then down on 16, it should be "juices" instead of "juice" and then the following language, "particularly single-strength Valencia orange juice," and then "and performs certain acts pursuant to such combination or conspiracy which proximately resulted in damage to the plaintiff."

In other words, this is apparently a formula instruction where they want everything covered, so all the elements of the cause of action should be put in.

Mr. Fowle: Well, they are in the important part of this instruction. It is in the next sentence.

Mr. Dixon: I know, but it is broken up part by part. [4066] That is what I am pointing out, counsel.

The Court: All right. Insert on line 16 after the word "juice"—make that "juices," and insert "particularly single-strength Valencia orange juice," and it would be "in the year 1951." Now, after that, what was your suggestion?

Mr. Dixon: Well, I have suggested striking of the words on 18 "or Exchange Lemon."

The Court: I haven't got that far yet.

Mr. Dixon: I'm sorry.

The Court: I didn't get the insertion you suggested on line 16 after 1951.

Mr. Dixon: "And performs certain acts pursuant to such combination or conspiracy which proximately resulted or which caused damage to the plaintiff."

The Court: "And performs certain acts pursuant to such combination or conspiracy which proximately caused damage to the plaintiff."

Mr. Dixon: That is correct. [4067]

The Court: All right. Tentatively we will put it in.

Now we come to the other one.

Mr. Dixon: Line 18, I have suggested striking out "or Exchange Lemon," since it is not a defendant, and, therefore, no judgment can be taken against it in this case.

Mr. Fowle: May I make this suggestion with respect to lines 18, 19 and 20?

The Court: Yes.

Mr. Fowle: As I think I mentioned before, we started out, that as an alternative, in view of your ruling about who can and who cannot conspire, we might make this change: "Unless you find, therefore, from a preponderance of the evidence, that Sunkist, Exchange Orange, Exchange Lemon, Tree-Sweet or Silzle, or two or more of them, combined and conspired."

The Court: I would prefer to say, on line 18, that Sunkist or Exchange Orange combined and conspired together, or with——

Mr. Fowle: That wouldn't be quite right, your Honor, because there is only one conspiracy charged here, and that is a conspiracy among these five concerns.

The Court: The jury could find a multitude of conspiracies. I don't mean a multitude at the same time, but they could find any one or more of various conspiracies. They could find that EOP had conspired with TreeSweet, for [4068] instance; they could find that EOP had combined with TreeSweet and Silzle; in other words, they could leave out any one unit.

Mr. Fowle: If you put it that way, if you say the jury can find—they can only find one conspiracy, but they can find less than all of the conspirators in that conspiracy as participants.

The Court: We are all agreed on the principle; now the question is how to word it.

Mr. Dixon: May I give you my thoughts for a moment for what they are worth?

I have suggested striking "or Exchange Lemon" on line 18, and striking the word "and" on line 19, and inserting the language of the statute "or" and on line 20 striking the word "1951."

The Court: Why take "1951" out?

Mr. Dixon: Because relating to the conspiracy we don't know that they——

The Court: But the 1951 there refers to the six specific allegations. And in 1951 did the specific things, or one or more of them.

Mr. Dixon: Yes, I see.

The Court: It belongs in there.

Mr. Dixon: You are right, your Honor.

"and did one or more of the specific acts"—I think [4069] you already suggested that.

Mr. Fowle: "did the specific things, or one or more of them."

The Court: That means the same thing. "did one or more of the specific acts"——

Mr. Dixon: "charged in the first cause of action"—"and that such act or acts had the purpose or effect of damaging and."

The Court: "damaging and"?

Mr. Dixon: Yes. ——"and eliminating competition of plaintiff in the interstate market."

"for California" should be added—"canned citrus fruit juices."

Mr. Fowle: I am lost.

The Court: I am lost.

Mr. Dixon: This brings it in line with the complaint, in my judgment.

The Court: Now, let me see.

On line 22 "charged in the first cause of action"—what were you going to insert there?

Mr. Dixon: "and that such act or acts had the purpose"—striking the word "specific"—"or effect the damaging and eliminating."

The Court: You don't want "and eliminating"? You would have to prove to both. "Damaging or"? [4070]

Mr. Dixon: If counsel is satisfied with it, then I am.

Mr. Fowle: We are not satisfied with this at all, as a matter of fact.

Mr. Dixon: I am restating here the elements of the cause of action, since it is a formula instruction.

The Court: Let's stick to this.

"effect of damaging or eliminating" or "and eliminating"?

Mr. Dixon: "and" it would have to be.

The Court: Why? This is the other way around. This is a formula instruction where——

Mr. Dixon: Yes.

The Court: "or eliminating."

Mr. Dixon: "competition of the plaintiff in the interstate market"—"for California" should be inserted—"for fruit juices, particularly single-strength Valencia juice."

Those are the suggested additions of the plaintiff.

The Court: Let me read what I have got. Start at about "Unless" on line 16. "Unless you find,

therefore, from a preponderance of the evidence, that Sunkist or Exchange Orange, or one or more of them"—it should be "or either of them," shouldn't it?

"or either of them, combined or conspired with either TreeSweet Products Company or E. A. Silzle Corporation, and in 1951 did one or more of the specific acts charged in the [4071] first cause of action, and that such act or acts had the purpose or effect of damaging or eliminating the competition of plaintiff in the interstate market for California citrus fruit juices, particularly single-strength Valencia orange juice, your verdict must be for the defendants on the first cause of action."

I think you limit yourself in that score where you insert "particularly."

Mr. Dixon: I am sorry, Judge, I didn't hear you.

The Court: I think where you insert that last "particularly" in a formula instruction you unduly limit your position.

"if you find that defendants and one of the co-conspirators combined and conspired"—then you haven't enough in there even then. Combined or conspired to do what?

Mr. Dixon: As charged.

The Court: As charged, or violated the anti-trust laws, and in '51 did one or more of the specific acts charged in the first cause, and that such act or acts had the purpose and effect of damaging or eliminating competition of the plaintiff—then leave out the "particularly" there.

The verdict must be for the defendants.

I don't know.

Mr. Dixon: I think that is correct, your Honor. I get these things in mind—— [4072]

The Court: Since it is a formula instruction, a formula instruction should be "or." "fruit juices or single-strength Valencia orange juice."

I don't like these formula instructions, but I don't know any other way to present your position on these things.

In other words, this is a formula instruction and it has to be the broadest position of the plaintiff. So it would be fruit juices or single-strength Valencia orange juice, on line 24.

Those suggestions, outside the matter of form in this matter, don't do any violence to the principle of your instruction.

Mr. Fowle: They omit the word "specific."

The Court: The "specific" is in there in one place, "one or more of the specific acts."

Mr. Fowle: It omits the word "specific" before "purpose."

The Court: "and that such act or acts"—it refers back to the word "specific" used in the previous line——

Mr. Fowle: Two specific things, that was merely a reference——

The Court: Here is the way it reads——

Mr. Fowle: I am talking about specific intent.

The Court: I don't think specific intent is required in the conspiracy end of it. I ruled on that already.

Mr. Fowle: I understood there was some talk about that [4073] the other day, when there was a motion for a directed verdict. But if I might, I would like to point out briefly to your Honor the reason for the inclusion of that element in the instruction.

There has been a lot of talk about this Griffith case, United States vs. Griffith. This won't take very long. It will just take me a moment. In United States against Griffith, 334 U. S. 100, at page 105, the court states:

"It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws have been violated."

Stopping there just for a moment. It seems to me that that suggests very plainly that sometimes it is necessary to find specific intent. That implication is in the sentence.

Now, skipping down a little further in this paragraph:

"Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act. The classical statement is that of Mr. Justice Holmes speaking for the court in Swift & Co. vs. United States, 196 U. S. 375, at 396:

"'Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly — but require [4074] further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it

to pass is necessary in order to produce a dangerous probability that it will happen.' "

Now, I suggest to your Honor in this case, entirely apart from the charge in the complaint, or whether there has been proof of the six specific acts, it is claimed by the plaintiffs that those six specific acts were performed pursuant to a conspiracy to eliminate the competition of the plaintiff. I say that it does not necessarily follow from the performance of those acts that the competition of the plaintiff was eliminated. Those six acts do not lead directly and necessarily to the elimination of the competition of the plaintiff. And that being the case, I submit that proof of specific intent to accomplish what the plaintiff says was the unfortunate result here, following from the alleged wrongdoing of the defendants, must have been done with the specific intent that that result occurred. [4075]

The Court: I have your point.

Mr. Fowle: I think it is generally true in the tort field generally that where an act doesn't necessarily and directly lead to the result complained of, that a specific intent is necessary.

The Court: I have your point, but I suggest that this instruction and the problem we are now considering is based entirely on combination or conspiracy, and the instruction that we have already approved has language in it of the intent, and the conspiracy itself, if found, supplies that specific intent which you are talking about. You therefore distinguish between, we will say, the situation in an attempting to monopolize where one person, one

corporation might attempt to monopolize, and where there is a requirement for a specific intent from, for instance, conspiracy to monopolize, where the conspiracy itself necessarily requires the intent, or specific intent, and where the instructions on conspiracy cover that.

Here we have the conspiracy under Section 1, and therefore you don't build intent on intent. If the jury finds conspiracy, there is no chance of their having found an innocent act. That is the gist of it right there.

Mr. Fowle: Well, if that is the case, I see no harm, and it seems to me it is appropriate to state, then, that each of the acts charged to have been done pursuant to the [4076] conspiracy were done with the general intent that lies back of conspiracy, or with the specific intent that lies back of the conspiracy.

The Court: There might not be any harm.

Mr. Fowle: Perhaps I should put it a little differently. Instead of saying there wouldn't be any harm in doing it, it seems to me we are entitled to have the jury instructed that the objective, the specific objective of the conspiracy itself, is also the specific objective of each of the acts performed pursuant to the conspiracy.

The Court: You see, the words used are "purpose or effect." When I went over this instruction beforehand, one thing I noted was changing your and/or there. As far as purpose is concerned, that impliedly talks again about your intent. "such acts had the purpose." Now, "effect" gets you into

another field. As I read these cases, time and time again they talk about the purpose or effect, and this is "or" coupled with conspiracy.

Mr. Fowle: Has that word "and" between purpose and effect been changed to "or"?

The Court: Yes.

Mr. Fowle: The last time I heard your Honor read the change——

The Court: "purpose or effect."

Mr. Fowle: I had "and effect" because our proposed instruction [4077] would have read "purpose and effect." I mean if you change it to "purpose or effect," that is tantamount to saying you don't need the purpose at all, if these things were done with the effect of eliminating the competition of plaintiff, that is enough.

The Court: That's right. If you find the conspiracy as charged and that these things done pursuant to the conspiracy had the effect.

Mr. Fowle: But in this case, your Honor, you have got to work it the other way, it seems to me. You have got to look at the acts that were done, because those are the only things from which you can infer the existence of conspiracy. There is no existence of a conspiracy here other than these acts. I would submit there is no such evidence. It seems to me you have got to look at those six acts and determine whether those acts themselves were done with this specific purpose, because those acts do not lead necessarily and directly to the elimination of the plaintiff.

The Court: That is not the way to analyze a

conspiracy case. In your general experience on criminal conspiracies, there isn't one in a thousand where you have any people sitting down and agreeing. You have acts, things done. There are acts done in pursuance of it. It is from those things that are done that a jury can infer there was a conspiracy and there was unlawful intent. It is the old principle that [4078] an individual intends the natural and probable consequences of the act that he does.

Mr. Fowle: Correct, but——

The Court: Therefore, if he conspired, and there is the intent part of it, in fact, in the conspiracy law, it is presumed that if he conspires for a certain purpose, and X, a co-conspirator, who may not even know all of the plans, but has joined the conspiracy, then does an act which carries out the purpose of the conspiracy, every other conspirator is bound, because the intent has been supplied at the time the conspiracy was formed.

Mr. Fowle: Well, in any case, your Honor, you understand our position.

The Court: I understand your position.

Mr. Williams: May I add one thing? It seems to me your reasoning may be circular there. If you start out in this case, there is no evidence of intent apart from the acts, if that is accepted, then you use the acts to supply the intent for the conspiracy. Then you say now you have got the conspiracy for the intent, so you don't have the intent, and you come down to the acts. So you never get the intent in the case.

The Court: Mr. Williams, that analytical argument could be made in every conspiracy case. It would apply to the typical criminal conspiracy, that analytical argument could [4079] be made. I have never heard it made.

Mr. Williams: I think this is different, because each of the acts here is lawful per se. I don't think that is necessarily true in all cases.

Mr. Dixon: Well, I thought we had disposed of this matter before, and I hope we can dispose of it now, if this question is going to be raised in any of the further instructions.

The Court: I have disposed of it. The contentions are overruled. Let's read this over once more and I will have my girl retype it for us, because it is in a mess. Let's see what else we find in there.

Why should we each time talk about the full name of these companies? Why don't we just say TreeSweet or Silzle? You don't care about that, do you?

Mr. Fowle: No.

The Court: It would be easier for me to read.

Mr. Fowle: That was a typographical error.

The Court: Line 9, change "canned" to "California citrus fruit juices."

Mr. Fowle: The next line, I think, straightens that out, "canned citrus fruit juices processed in California and marketed throughout the United States."

The Court: Then just strike out "canned."

Mr. Fowle: I think the word "canned" ought to be there. It is in the complaint. That is the charge against us. [4080]

Mr. Dixon: I won't argue with you about it.

The Court: Of course, the word "canned" is used, I take it, in a broad sense where it is used. If it is put in a glass container and sealed up, I suppose it would be canned. I don't know that there is any proof—I heard some proof about drums. I got the impression some of this juice was put in bottles, some of the concentrate.

Mr. Dixon: No, just the fresh fruit, Judge.

Mr. Walker: Distributed through the dairies. Some of that is in paper cartons.

Mr. Williams: I think ordinarily the hot pasteurized concentrate beverage bases is not canned. It is put in barrels and drums.

Mr. Walker: 50-gallon drums.

The Court: I think that canned juice adds confusion. Is anybody going to argue about that? Are you going to spend some of your time in arguing about whether it goes in a drum or whether a drum is a can?

Mr. Fowle: You mean to the jury?

The Court: Yes.

Mr. Fowle: I would doubt it very much. I think, however, for the record, the charge here would involve canned citrus fruit juices. That has a more limiting effect than the phrase without the word "canned." The amended complaint is the frame of reference in this case, and I don't think [4081] we should get outside the pleadings.

Mr. Fisher: Throughout, we answered the interrogatories on the basis of the complaint.

The Court: I don't think it makes any differ-

ence so long as it is not going to be argued, so we don't have to define it to the jury.

Mr. Fowle: I don't wish to make a commitment that it won't be argued.

The Court: Well, if it is going to be argued, then I would tell the jury that putting juice in drums or in tin cans was the same thing, that the manufacturer is the canner, whichever way he puts it out. This case isn't going to turn on some little thing like that.

Then make this TreeSweet or Silzle.

Mr. Fisher: You are just changing that to Tree-Sweet and Silzle?

The Court: Yes. Well, I think we better type it up and see what we have. It's pretty hard to follow.

To complete the record now, so it will be here when we come back to it, I propose to give 7 in the form we have got it now and overrule the contentions and objections of the defendants. But we will look it over again when it is revised. This will be revision No. 1 of 7.

Defendants' 8. I have got same or similar as to 7, and I have got "intent or effect" written down here in ink on [4082] it. Are defendants satisfied with it?

Mr. Fowle: We have two or three minor alterations.

The Court: All right.

Mr. Fowle: In the first line, after the words "specific acts," "or one or more of them."

In the third line, after the word "intent," "and with the effect."

The Court: Third line?

Mr. Fowle: Yes. I beg your pardon. Line 5.

The Court: "specific intent or effect"?

Mr. Fowle: So that line 5 reads, "specific intent and with the effect of eliminating plaintiff."

The Court: "And"?

Mr. Fowle: Right.

The Court: All right.

Mr. Fowle: In line 8, after the words "specific acts or any one of them." Otherwise, we submit the instruction.

The Court: Let me look it over. I propose to reject the instruction for various reasons. First of all, it runs into the same problems that we discussed in the previous instructions about intent and effect, intent or effect, and it is a repetition of what is contained in the previous instruction.

Furthermore, it is unintelligible. I get lost in reading it. Beginning particularly with the comma after the [4083] juice on line 6.

On the ground that the statement appears, "the disappearance of plaintiff as a competitor was not the necessary and direct result of these specific acts," which is an instruction to the jury that they should find a certain fact, and for other reasons.

What showing do you want to make on it?

Mr. Fowle: Well, so far as line 6 is concerned, if there is any confusion about the interstate market for canned citrus fruit juice we are perfectly willing to change that to comply with the language that has been used in other instructions, that is, for canned citrus fruit juices processed in California and sold in interstate commerce.

The Court: What do you add here that you haven't covered in 7? I am not talking now about how your views and mine differ on some of it, but even assuming it was dressed up so that it followed the same line of 7, what do you add that isn't in 7?

Mr. Fowle: Well, if 7 had been given as proposed, that is, if it had contained and still contained the theory which the defendants wish incorporated in it, proposed instruction No. 8 would simply point out to the jury, and properly so, it seems to me, why it is that they are being told that specific intent is necessary.

The Court: Going back to 7 a minute, you see, the only [4084] major dispute we had outside of some matters of some dressing it up, was this intent or effect and, secondly, correlated to that, the question of specific intent. That is our major parting of the ways on 7.

Mr. Fowle: I think that is correct.

The Court: Well, I will reject 8.

Mr. Fowle: I take it that we have——

The Court: You have made a record and what you said as to 7 may apply here, varied somewhat.

Mr. Fowle I might also say this, your Honor. As I believe I said the other day, in view of your rulings with respect to the question of intent, that is to say specific intent, as I have used the term, we believe that the jury should be instructed to find whether or not the results complained of in this case did as a matter of fact follow necessarily and directly from the acts complained of, and that if they should find that there was not that necessary

connection, that is to say, that the results did not follow directly and necessarily from the acts complained of, that then they must find whether or not those acts were performed with the specific intent of accomplishing the results complained of.

The Court: That is just what they have been told in 7. You have got a formula instruction, if you find, and so on—if you find one or more of these acts was done for the purpose of or with the necessary effect or with the effect. [4085]

Mr. Fowle: The word "necessary" isn't in that instruction.

The Court: No.

Mr. Fowle: If the word "necessary" were there, that might change our view on this a little bit.

The Court: We will talk about it when it comes up. Anyhow, the alternative is there, one or the other, and under your formula instruction they can't find for the plaintiff unless they find one or the other.

Mr. Fowle: If the word "necessary" is there, that changes it, but I don't believe the word "necessary" is there. [4086]

The Court: We will look at 7 again when it comes back.

Now, No. 9.

Mr. Dixon: I make this comment at this time, your Honor, with reference to instructions 9 through 14.

Plaintiff objects to them on the ground that they are picking out particular acts and saying there is

nothing wrong with them in and of themselves, and then going on to further elaborate concerning them.

Of course, I am willing to stay here and will stay here as long as it is necessary to discuss or go through these instructions but it seems to me that 9 through 14 all come within that general statement and objection.

It is certainly not in order to pick out each particular thing and say it is lawful, and then say it only becomes unlawful when it is done under certain circumstances. Because one general instruction on that point, that acts lawful in and of themselves can become unlawful——

The Court: Let me say this: When I went through these, 9 through 14, I marked the same thing on them. And I also had the note "Will plaintiff eliminate ELP." That was the suggestion that I made that you didn't want to follow. Then, further along, I think I have some comments which I mentioned yesterday, that you can't cut this up piecemeal and say each thing was lawful and then ignore the fact that collectively they could be unlawful; and I propose to reject [4087] 9 through 14 as they now stand, and permit you to submit some other instruction in lieu thereof.

Mr. Fowle: If the court please, it is our view that these six specific acts are the most important part of the plaintiff's case, and if any one or more of them was not a part of the conspiracy, wasn't done with the objective that lies back of the conspiracy, that that should be smoked out, and that particular act put aside and not considered as being a part of the case at all.

We feel that we have a right, here, to have the jury take a look at each one of these acts and see whether or not it should be considered as a part of this case.

The Court: You have that right, but here you have repeated, from line 8 to 17, in each one of these, the same language. There is no necessity for that.

Secondly, I think as a matter of law you are wrong in your statement that "you will disregard one of these as being of no consequence in the case."

That is a very broad statement, and it is probably erroneous as a matter of law. Because even if one of these acts is not the cause of specific damage to the plaintiff, I don't think it follows that you can tell the jury "You may disregard it as having no significance in the case."

Mr. Fowle: I believe——

The Court: Let me finish in one or two sentences, and [4088] you will see what I mean.

Acts one to six, supposing they find that acts one and two caused no damage, the acts one and two are still in evidence as part, then, of the general background of the case, and the jury may from those facts proved draw other inferences, or they might be able to use it in various ways, and you would have read each of these out of the case completely.

You are in substance telling the jury: Just treat this case now as if there was nothing ever said about those things.

And I think that is wrong as a matter of law.

What you really mean is: if you find that this was a legal contract and was not part of the conspiracy, then it cannot be considered by you as being any cause of damage to plaintiff.

Mr. Fowle: Our position is a little more than that, Judge——

The Court: Not as you have it written out here.

Mr. Fowle: We say if any one or more of these acts was not part of the conspiracy—that is the first and the important point.

The Court: Not part of the conspiracy, that means part of the intended purpose of the conspiracy.

Mr. Fowle: If it wasn't done pursuant to the conspiracy, we think the jury should disregard it. [4089]

The Court: But you can't tell the jury it is of no consequence in this case.

You can't read it completely out of the case.

Are those your views in the case, Mr. Dixon?

Mr. Dixon: I think you have stated them, your Honor. Namely, there may be certain acts which may be part of the conspiracy, which do not necessarily have to damage the plaintiff. But if you read them out of the case merely by saying that you can pick this one out, and if you find this was done, so and so, you may disregard it, and then follow that to its logical conclusion, you then have completely dismembered all of the acts charged to be part of the conspiracy and wind up with nothing.

Mr. Fowle: That is exactly right.

Mr. Dixon: That is not correct, in my judgment. The decisions of the Supreme Court and the courts of appeal on this question have repeatedly held that you cannot dismember these acts and pick them out one by one and say there was no conspiracy because this act was lawful.

The Court: I am satisfied on that. Now, make your record on 9 to 14, which I am going to reject and permit you to submit one alternate.

Mr. Fowle: I think we have made our record, your Honor. We object to the refusal to give these instructions, and I think we have made our position sufficiently clear. [4090]

The Court: The objection is overruled. I will reject 9 to 14, with permission to supply something in the alternative.

9-A is submitted here.

Mr. Fowle: Proposed instruction 9-A may not be very artistically done. I did it rather hurriedly last night. But it is an effort to combine in one instruction——

The Court: What we talked about yesterday?

Mr. Fowle: That's right.

Mr. Dixon: I see we are back in the old problem again.

The Court: 9-A falls afoul of the same thing which I mentioned in 9 to 14. "of no consequence in this case."

In other words, you are reading them completely out of the case.

What you are entitled to say is this: If they find that a particular one of the specific acts did not

cause the plaintiff any damage, or was not part of the conspiracy, then they may not consider that act in connection with any damage to the plaintiff.

Mr. Fowle: Perhaps as an alternative we can modify this. We can submit it in the alternative form.

The Court: Maybe you can.

Let me look at this a minute.

I notice in the Second Amended Complaint under Specifications, that you lead off with certain allegations about [4091] Silzle and not about TreeSweet. What is the reason for that?

Mr. Dixon: What page is that?

The Court: Page 10.

You may have been following the language of the complaint at the time TreeSweet was a defendant.

Mr. Williams: What page is this?

Mr. Dixon: Page 10.

Mr. Williams: What paragraph?

Mr. Dixon: 3.

Mr. Fowle: Frankly, I have not had an opportunity to read the Second Amended Complaint. I have been working from the First Amended Complaint with the amendment.

Mr. Dixon: I am sure this conforms to the amendment.

The Court: You see, you start out with TreeSweet as a defendant, and then you wound up with TreeSweet as a co-conspirator. And I think in your First Amended Complaint——

Mr. Dixon: Certainly the first paragraph shouldn't start out with Silzle.

The Court: Should not what?

Mr. Dixon: Should not start out with Silzle, I am certain.

Mr. Williams: Here is your First Amended Complaint. It starts out with Silzle.

The Court: What happened now, to trace it back, the original complaint said, under Specifications, that was 3, [4092] that the defendants contracted, combined and conspired, and so forth. At that time TreeSweet was a defendant, and the original complaint didn't have Silzle named. Then you come along with the First Amended Complaint, and I guess that was before TreeSweet was out, too, wasn't it?

Mr. Dixon: Yes, it was, Judge. That is, they were still named as a defendant.

The Court: They were still a defendant.

Mr. Dixon: Yes.

The Court: So you come along then——

Mr. Dixon: What was apparently done here——

The Court: Then when you came down to 3, of course you had TreeSweet as a defendant, and you were putting Silzle in——

Mr. Dixon: And leaving out TreeSweet.

The Court: Yes.

Mr. Dixon: That was done——

The Court: I am not talking about your Second Amended Complaint. In your First Amended Complaint TreeSweet was still a defendant. Then when you filed your Second Amended Complaint, meanwhile TreeSweet was dropped as a defendant, but

not as a co-conspirator. So you have only Silzle in here in your Second Amended Complaint and not TreeSweet.

Mr. Dixon: Frankly, your Honor, I did not have a chance to read this, Mr. Irwin prepared it, because I have been so [4093] tied up with other things that I just didn't have a chance to read it until your Honor directed my attention to it.

I would like to ask leave at this time to amend by interlineation——

The Court: Let's not do it now. Let's look it over. I think probably all you have to do is add "TreeSweet" after "Silzle" or before "Silzle."

Mr. Dixon: "co-conspirators TreeSweet and." That is what I would like to add.

The Court: Throughout the two previous paragraphs of the specifications.

But look it over and see. Because apparently when you prepared your motion and gave it to Mr. Irwin, as your amanuensis, he typed it up as you had it, but you still hadn't taken into account that TreeSweet was no longer a defendant.

Mr. Dixon: You are right, your Honor.

The Court: I was just looking over those six acts.

With reference to revising 9-A, or drawing another one, I don't know how you are going to say it, but—before I forget it, on this amended complaint, you have on page 3 of the Second Amended Complaint said "defendants" on line 11, then you have Sunkist, EOP, then you have got Lemon. Well.

technically Lemon is not a defendant. I suppose line 11 should be "defendants and co-conspirators."

On page 4 you have "TreeSweet and Silzle" who are not [4094] defendants but are co-conspirators.

Mr. Dixon: I think it is on page 6, also, your Honor. We have defendant ELP, for instance, on page 6, which has been dismissed.

I think your Honor will appreciate the circumstances under which I have been working here the last three or four weeks. The intention is clear, of course, to have the amended complaint conform to the record as it now stands, and Exchange Lemon, of course, is not a defendant. It is still a co-conspirator. TreeSweet is not a defendant, but it is still a co-conspirator. And to the extent necessary to——

The Court: Look it over and we will talk about it later.

If I were going to draw this instruction, or was going to try to instruct the jury on it, I would start out by saying: Now, I want to talk about the six items which we referred to as the acts complained of. Then I would say: As to each of these acts standing by themselves, and unconnected with any combination or conspiracy, there is nothing illegal or claimed to be illegal about them. Then I would say—I may be repeating—as heretofore explained to you, or as you have been instructed, plaintiffs' recovery, if any, must be based on proof of violation of the antitrust laws, and proof of one or more of these acts and damage proximately resulting from these acts.

And then I would wind up with some conclusion: performed [4095] pursuant to conspiracy.

We have, again, purpose and effect, which we have to be consistent on. And then you have to change this latter language about being of no consequence in the case: You will disregard such act, therefore, if not proved, as being any cause of damage to plaintiff. [4096]

Now, I would try to dictate one, but from what I have seen, I think you fellows are better able to dictate it than I am. Ross Fisher and I were commiserating last night on hearing the three of you glibly talk about antitrust law. I drew one and shoved it at you and I am ashamed of it. I have some that I haven't talked about yet. Some of them have elements that ought to be covered, but I am way off the beam on some of them.

Mr. Fowle: Well, we will take a whirl on this.

The Court: All right. 9 rejected with permission to submit something else.

Mr. Fowle: 9-A, you mean.

The Court: 9-A, and the matters heretofore discussed under 9 to 14 and under 7, I think it is, are incorporated as defendants' showing in the matter. Overruled.

Do you want to go gack now, before it gets too far behind us, and look at 7? We will just proofread this hurriedy first off the record.

(No. 7 proofread off the record.)

Mr. Dixon: I think line 27, the word "and" should be "or," the language of the statute again.

The Court: Line 29?

Mr. Dixon: Yes, "were made pursuant to the combination or conspiracy."

The Court: On 24 to 29, where that phrase is in there, [4097] wouldn't it read better if—well, no. I don't like the phrase in there where it is. Don't you think maybe it should go at the end?

Mr. Dixon: I think it reads better.

The Court: I think it reads better to put it at the end.

Mr. Dixon: Yes, it should go at the end, Judge. I think it reads better that way.

The Court: Would it be "and" or "or" there?

Mr. Dixon: In line 26, it should be "or."

The Court: All right. Here is 7, which she has typed over again. This is another one I will read hurriedly to see if she has done her typing job.

Mr. Fowle: What are we doing with No. 37?

The Court: 37 was already passed. But the thing was so chopped up on your sheets and mine, I was going to give you another sheet to work on. That's the only reason I retyped it. The record has been made on that.

Mr. Fisher: Just for consistency, I think elsewhere you refer to them as Exchange Orange. You can strike the word "Products."

Mr. Dixon: What's this?

The Court: Strike out the word "Products" after Exchange Orange, to cut these names down.

Mr. Dixon: Yes. [4098]

The Court: I will do some of that sort of thing when I go over these finally.

Now, 7. I handed you that and we have just been over it.

Mr. Dixon: 37 is given subject to these changes?

The Court: The same objections would apply to what few changes we made this time to 37, and the objections will be again overruled.

Now we will proofread this one.

(No. 7 proofread off the record.)

The Court: Now, the question is, has she typed it properly?

Mr. Fowle: There are one or two little things. On line 8, you read the word "processed" where there is the word "produced" here. I don't know that that makes any difference, your Honor.

The Court: I read "processed"?

Mr. Fowle: I think you did.

The Court: It is "produced." We were just proofreading now.

Mr. Fowle: And she has put "plaintiff" all the way through in the singular.

The Court: "Plaintiff"?

Mr. Fowle: That is a question we are going to come to sooner or later. It seems to me there really are not two [4099] plaintiffs here. I don't want to be technical, but Mr. Walker is an intervenor and not a plaintiff. There is only one plaintiff here.

Mr. Williams: When you speak about injury to plaintiffs, the injury didn't occur to Walker, but to Winckler & Smith.

The Court: I think to be consistent all the way through, we will make it just plaintiff.

Mr. Dixon: That is agreeable.

The Court: I will try to make this change in the proofreading of it all the way through. Any other place where she is badly off?

Mr. Fowle: That's all.

The Court: Now you can read it a little better than you could before. I notice in line 19 you have got only TreeSweet and Silzle. Do you want ELP in there?

Mr. Dixon: I suppose they ought to be in. What is the defendants' position on this instruction now?

The Court: I already indicated I was going to give it, but I told you I would type it up for you so you could read it more easily and we could look at it again. Now, what further objection do you have?

Mr. Fowle: Well, I believe we have made all the objections to a refusal to grant our original No. 7, but subsequent to that we did discuss the possibility of inserting the word "necessary" in front of the word "effect," in line [4100] 22. I think your Honor will notice that in the amended complaint, the second amended complaint itself, if you look at the very first paragraph of the second cause of action, which is really the umbrella paragraph under which everything else falls, the words purpose and effect are stated, with the word "and" in between them. It is "purpose and effect."

The Court: Well, that wouldn't necessarily mean that you couldn't prove purpose or effect. It is just conjunctive pleading. So it is a question of what the

law is and not how it is stated. That doesn't convince me at all.

Mr. Fowle: That is what we are charged with.

The Court: Well, take a simple tort case. You allege that the defendant negligently drove his vehicle at a high speed, cut a corner, and was dead drunk, and injured the plaintiff. So you come into court and what do you do? You tell the jury, if you find the defendant negligently drove at high speed or cut a corner or was dead drunk, you find for the plaintiff.

We are talking about a pleading question, and the question we really should talk about is as a matter of law, and that is what we have talked about heretofore.

Mr. Fowle: Well, in any event, we would request that "necessary" be inserted before the word "effect" in line 22.

The Court: Any objection? [4101]

Mr. Dixon: I have no objection, Judge.

The Court: It is one of the things, if a jury is listening carefully, all right, but I don't think they get these. I will add "necessary effect."

Mr. Dixon: I am inquiring now, specifically what objections, if any, does the defendant have to this instruction now?

The Court: Let's see if I can state it. I think it boils down, the real issue boils down to the word "or" between purpose and effect, purpose and necessary effect. The defendants claim it should be "purpose and necessary effect," and their second point was that there should be something about a

specific intent. Those are the only two objections that I can recall, other than matters of form and dressing it up. Is that right?

Mr. Fowle: I believe that is correct.

The Court: I think that is the only place we parted company. There were minor changes on language used, and so forth.

Those objections are overruled. I will give 7.

Mr. Fowle: May I ask, was ELP referred to?

The Court: Yes, added on line 19, and strike out "or" and make it TreeSweet, Silzle or ELP.

Now we go to 15. Let me look at it. Are the defendants content with it? [4102]

Mr. Fowle: I would suggest the insertion of the words "or control" after the word "acquire" in line 11.

Mr. Fisher: Don't you need the word "of"?

Mr. Fowle: I guess "control of."

Mr. Dixon: "control of." Where do you want it?

Mr. Fowle: No, we don't need the "of."

Mr. Dixon: Strike out the word "acquire"?

Mr. Fowle: No. "to acquire or control," that is the way we suggest it read.

The Court: Then you don't need "of"?

Mr. Fisher: No.

The Court: Just insert "or control." Well, now are you satisfied with it?

Mr. Fowle: Yes, sir.

The Court: My reaction when I first read it over, and I made these notations, was that to start with from line 14 on, I have gotten written out.

"You are setting up a straw man which hasn't anything to do with the case and instructing on it." Is that your objection?

Mr. Dixon: Judge, you must be a mind reader. I have the first part marked okay. I think it is repetitious, because I think it has already been given in substance in some of the other instructions, but I am not objecting to it.

The Court: Of course, the law is this, so we get ourselves square on these things. When you submit an instruction [4103] and there is anything wrong with that instruction and I throw it out, as long as there is anything wrong with it, your instruction is out. The instruction submitted must be correct and proper in all respects. However, we do try on both sides to see if we can obviate little things that might otherwise throw an instruction out.

Now, as to the first part, let me see that. That has been covered in another instruction and so I would propose to reject 15 in toto unless you show me there is some element in there we haven't covered in some other instruction.

Mr. Fowle: Well, the second cause of action starts out by alleging that the defendants Sunkist and Exchange Orange and the alleged co-conspirator Exchange Lemon have a monopoly control over the fruit grown and available for processing in California and Arizona.

The Court: All right. In that connection, let me stop there. I don't want to break your chain of thought, but let me just stop there. I have tried

somewhere in here, and will again point out that this—that is why I think this is repetitious—this is background. It is not contended by the plaintiff to be anything but background. In other words, their violations of the antitrust law do not count particularly on that alleged monopoly over product oranges. That is the background against which the allegations of violation [4104] of antitrust laws are alleged to have occurred, and the monopoly in the second count actually, as far as the working end of the cause of action is concerned, is on the monopoly over juices. [4105]

Now, that is what we did when I summarized plaintiffs' contentions. I have got that very thing covered.

So, again, I say if you want something on this as to your second cause on monopoly, you are going to have to bear in mind the distinction of the two monopolies talked about.

Mr. Fowle: I think we have borne that in mind. I simply believe that we are entitled to an instruction that, in effect, explains away the allegation with which the second cause of action starts, that we have this monopoly control, and some explanation as to why that is. That there is nothing wrong about that.

That is what this instruction proposes to do; to make it a little clearer to the jury.

The Court: All right. Let me look at it again.

I noticed, also, when I was telling you about my original comments, I had taken your first part and

gotten down to the words "Capper-Volstead Act" and added, "and did not illegally use that monopoly."

Mr. Fowle: Where would that phrase go?

The Court: Right after the "Capper-Volstead Act."

In other words, it is not illegal for them to acquire large control of fruit if they do so solely through co-operative action authorized by the Capper-Volstead Act—"and do not illegally use that monopoly."

Mr. Fowle: We would object to any such addition as [4106] that, Judge, because we don't concede that they had a monopoly. This instruction is very carefully phrased so as not to make that concession.

We don't concede that there was a monopoly. Even as to this background aspect of the case, to use the term that has been used here, we do not concede that there was a monopoly.

Mr. Dixon: Plaintiff in the trial of this case, and in the argument to the jury, so the record may show our position again, is going to concede that if you had a monopoly, that you had a legal monopoly over the oranges that were available for processing.

The next instruction raises the question of whether you did or you didn't. You probably claim you didn't have.

Mr. Fowle: Right.

Mr. Dixon: But we are not questioning the fact that you could have, put it that way, a legal monopoly.

Mr. Fowle: I understand that you are not questioning that a monopoly, if it existed, would be a lawful monopoly.

Mr. Dixon: That is right.

Mr. Fowle: We understand that. But we are also contending, even though you make that concession, that there was no monopoly.

Mr. Dixon: I understand.

That raises a question, then, of either fact for the [4107] jury to decide whether you had that, or if the court feels that it wants to instruct on that question, that they in fact do have one, or leave it to the jury.

The Court: Let me get this straight.

As far as your first cause of action, do you make this contention of the monopoly on product oranges?

Mr. Dixon: Yes, your Honor.

The Court: Both causes?

Mr. Dixon: Yes. It is in both causes of action. In other words, they do have monopoly control over the product oranges available for processing; that there is nothing illegal about that monopoly control insofar as the manner and method in which it may have been acquired is concerned; that the Capper-Volstead Act, and so on, permits the defendants to acquire a legal monopoly, if they want to do it.

The Court: You allege it specifically in the second cause. Do you allege it in the first?

Mr. Fowle: I don't believe that that was the court's question. I think the court's question was whether or not this supposed existence of the mo-

nopoly is essential background to both causes of action.

We would say——

Mr. Dixon: It is, yes.

Mr. Fowle: ——in any event it is not relevant background to the first cause of action. Because the first cause of [4108] action doesn't involve Section 2.

Mr. Dixon: Here on page 5, Section (b), talking about the industry, says they are the largest single source, and so on, and have two-thirds, and that they determine the selling price, and so on.

Those are factual allegations.

The Court: I am satisfied on that.

Mr. Dixon: So that it is part of the first cause of action.

Mr. Williams: Is it the plaintiff's position, then, that if he fails to prove that we had a monopoly power in the first cause of action, that his first cause must fail? If it is, then we are entitled to the instruction to that effect.

The Court: I think he considers it essential to the second cause, but—what is your view on that? Do you have to have that in on your first cause, restraining trade and commerce in juices?

Mr. Dixon: On page 6, starting with line 2, the complaint reads: Because of the monopoly control by Sunkist and EOP over the quantity and price at which Valencia oranges, and so on.

Mr. Fowle: Is that from the first cause of action?

Mr. Dixon: This is in the complaint as part of the first cause of action. [4109]

The Court: Now, Mr. Williams is trying to pin you down, and the question is, do you contend that that is a necessary part of your first cause of action?

And if you do contend it is, then he suggests that he wants an instruction on that.

I personally don't think it is a necessary part of your first cause, although I think it is a necessary part of your second cause.

On the other hand, I think you are entitled to use it as part of your first cause from the pleadings that I have seen.

Mr. Dixon: Paragraph (e) of III of the specifications I think answers that question as effectively as I can answer it.

That is one of the six specifications of the alleged conspiracy charged in the first cause of action.

The Court: One of the six acts complained of?

Mr. Dixon: Yes.

The Court: All right. Let's go ahead on this. And, therefore, since it is one of the six, you claim you have a right to avail yourself of it——

Mr. Dixon: Yes.

The Court: ——but you don't necessarily——

Mr. Dixon: Have to prove it. But which I think we will.

The Court: I will dictate something here to my secretary: [4110]

"The plaintiff has set forth allegations concerning two monopolies: one, allegations that the defendants Sunkist, EOP, and co-conspirator ELP,

have a monopoly control over the production and distribution of fresh citrus fruit, that is, product fruit, available in California, Arizona, for processing in California into citrus fruit juices. And, two——"

Mr. Dixon: Do you want me to interrupt you there?

Our contention is, as part of the case, that they have and account for two-thirds of all of the oranges, and so forth, and 89 or 88 per cent of all the lemons that are available, fresh fruit, and so on. Now, the balance of the oranges that remain, or the oranges that remain after the fresh fruit has been disposed of, constitute the primary source of fruit for independent processors.

Now there is, as you have suggested, and there would have to be to start with, a sufficient amount of control over the entire production for it to follow that they would have a control over what was left, but the case stems and is based on the fact that they control the amount of product and have a monopoly and thus control the amount of product oranges and lemons that are available to independent processors for processing into citrus juice products. [4111]

The Court: This is very rough. Let me finish what I am thinking about. We certainly can't take all that time to tell the jury what I have in mind here.

"And, two, have alleged that the defendants Sunkist, EOP, and the co-conspirators, ELP, Tree-Sweet, and Silzle, have conspired to and have in fact

monopolized that part of the interstate trade and commerce in citrus fruit juices produced in California and sold in interstate commerce, and particularly single-strength Valencia orange juice.

"There is a basic difference and distinction between the two monopolies referred to in the allegations of the plaintiff, and the court desires to explain the matter and call it to your attention in connection with considering the issues and evidence in this case.

"As to the first monopoly referred to, which we will speak of as the monopoly over product oranges and product lemons——"

Mr. Dixon: Grapefruit was also included, but there wasn't much evidence of it.

The Court: ——"that is, product oranges, lemons and grapefruit, the plaintiff concedes, as it must, that this was a legal monopoly under the provisions of the statutes relating to marketing associations. [4112]

"Plaintiffs' allegations as to the second alleged monopoly, which we will refer to as to the alleged monopoly over citrus juices, is urged by plaintiff as the basis of its claim of violation of the antitrust laws in connection with its allegations of conspiring to monopolize, and having in effect monopolized.

"Now, returning to the first alleged monopoly referred to, you are instructed that it is not a violation of the Sherman Act, or of any other antitrust act, for co-operatives such as defendants Sunkist, Exchange Orange, and alleged co-conspirator ELP, to acquire or control a large or even 100 per cent

of the citrus fruit or citrus fruit products grown in California and Arizona, if they do so solely through their co-operative or collective action authorized by the statutes relating to marketing associations."

Now, nobody will be happy with that, but that is what I would try to tell the jury, to try to get them to understand what the case is about.

Is it even worth while writing up?

Mr. Walker: It stops too soon.

Mr. Dixon: Judge, here is my thought, for what it is worth: Reference, perhaps, to some of the allegations in [4113] the complaint almost verbatim, if you care to use them, I think would point it up, point the monopoly contention, or that question up——

The Court: Now, look. The trouble with the allegations in the complaint and all that, the same as with instructions offered by the defendant, are that you get these involved things which a jury can't understand.

I haven't finally decided, but I may try to explain to this jury something about what this case is about. If I do so, I am going to come to a part of my instructions and then say:

"I have been giving you instructions. Now I am going to give you what might be called my comments. I am not going to comment as to what I think you should find or not find, but I am going to try to tell you in laymen's language what the case is about and what some of the issues are. These comments you can disregard."

And then when I get through I will say:

"Now, I am going back to my instructions as to the law."

And when I did so, I would try to tell them in ordinary language something about this case. And I don't think it would be error—I know it wouldn't be error, first because I have a right to comment, and, secondly, because I would [4114] try to tell them and would tell them in laymen's language that there are two monopolies referred to in this complaint. One is a monopoly referred to by the plaintiff referring to monopoly of the citrus fruits and by-product fruits, which plaintiff claims that the defendants Sunkist, EOP, and ELP possessed; the second is that plaintiff's charge that there was conspiracy to monopolize, and in fact monopolization, of the fruit juices produced here in California and sold in interstate commerce.

Mr. Dixon: Judge, that is your second. Your combination and conspiracy to monopolize and the monopolization of the citrus juices.

The Court: I know but it is another monopoly talked about, conspiracy to monopolize and monopoly.

Mr. Dixon: The difference being in the first instance, we concede——

The Court: Let me finish.

Mr. Dixon: I am sorry.

The Court: I would say: As to this first monopoly, which I am going to talk about, a monopoly in fresh fruit or product fruit, and so forth, the plaintiff concedes that that was not an unlawful

monopoly. The plaintiff has alleged it as part of the background of this case.

The defendants do not admit that they have that monopoly, but they contend, and rightfully so, that even if they [4115] do have it, it is a legal monopoly.

When you get to the second monopoly, however, then you have a hotly contested issue. Plaintiffs' allegations are that certain of the defendants and co-conspirators conspired to monopolize, not the product fruit, but the juices made from the product fruit, and that the plaintiffs allege, and the defendants deny, that the defendants and the co-conspirators did, in fact, monopolize these fruit juices.

Now, I want you, as the jury, in considering this problem to bear in mind that two monopolies have been talked about, and two different rules apply to them, and so forth.

I think they can understand that kind of talk. If you pick up the language of the complaint and start to read the stuff, they won't know what it is all about.

You are as interested as Mr. Dixon is to have them understand that—you may not agree that there are two monopolies or two issues as to monopolies, but you certainly are as interested as Mr. Dixon is for them to know that there is nothing illegal in a monopoly in product fruit.

Mr. Dixon: That if there is one, it is a legal one.

Mr. Fisher: Or in juices.

Mr. Dixon: Juice is something else. That is where we part company.

Mr. Walker: Even on fruit, isn't there a cut-off

point where that monopoly legality ceases? [4116]

The Court: Technically you can put in all sorts of distinctions.

You have a jury of 12 people out there that are laymen. Here are two guys, and one other that I am going to add to the list, that know something about antitrust law, and here you are, and Fisher, and myself, that know a litfle about the antitrust laws, but we don't claim to be experts on it.

Mr. Walker: Next week one or the other of us will be.

The Court: So you have a jury that you are trying to tell something to about antitrust laws. The least you can do, in common decency, even if you make a few little errors in leaving out this or that, or some of the fringe stuff, is give them some idea of what this case is about.

Mr. Dixon: I think Judge Wyzanski's charge in the cranberry case, Judge, if you haven't looked at it, is a very good example of doing precisely what you have in mind. It is an excellent charge.

There are only two or three things that I disagree with, and it does deal with a lot of these problems that we are discussing, and on which we are endeavoring to arrive at instructions that will help the jury decide the issues in this case.

It is not an easy one. No one knows that any better than I. Yet, it is relatively simple if placed in focus, as you have indicated there shouldn't be any—— [4117]

The Court: Do I understand your theory?

Mr. Dixon: I think you certainly do, your Honor.

The Court: All right. I think I understand the defendants' theory. You say, first, there is no monopoly over product oranges, fruit, but if there is, it is perfectly legal and, of course, they deny there is any conspiracy, to monopolize or actual monopolization of fruit juices.

Mr. Dixon: That's right. They go back a step beyond my argument. I start with the premise that they have a monopoly control over the products fruit that is necessary for the plaintiff to continue in business. They say there isn't, they don't have such a monopoly. Therefore, that makes a question for the jury to decide, whether they did or didn't.

Now, starting from that point, the plaintiff says, "by reason of the monopoly control and the other things done here, they stabilized and control the prices at which oranges were available to independent processors at $40," and so on. The price is so high that the plaintiff couldn't purchase them, and so on and so forth.

But one of the reasons that they were able to do that, of course, was because, as the complaint alleges, they had this monopoly power, control over the oranges, so that the plaintiff couldn't get them from any other source, as well as from the defendant, on the basis that would have enabled them to have processed products oranges into citrus [4118] juices and compete with the defendants and the juice that was processed under these contracts.

Now, the second cause of action—in other words,

that is where the restraint operates, the unreasonable restraint imposed upon commerce by reason of the exercise of this power to do the other things which are complained of, so the plaintiff was unable to process any juice, and therefore it was eliminated as a competitor and the restraint complained of with the damage resulted.

Now, as to the second, Section 2 act, the plaintiff incorporates all of these claims again as part of its second cause of action, and says further that exercising this monopoly control over the production and distribution of fresh fruit available in California and Arizona for processing into canned citrus juices, and by doing these things complained of, and by, furthermore, entering into these processing contracts with Hyland Stanford, and so forth, they tied up the facilities available even to other independent co-ops, like the Independent Fruit Growers Association, so that as part of that combination and conspiracy to monopolize citrus juices processed in California and sold in interstate commerce, the plaintiff was eliminated as a competitor, and the monopoly achieved.

The Court: Well, now, I am not going to argue the case for you. That's a good argument to the jury. [4119]

Mr. Dixon: That is the contention.

The Court: I know, but I am not going to argue your case for you.

Mr. Dixon: Of course not.

Mr. Walker: Stated much more briefly, but perhaps not as artfully, the impression which would be

left by what you dictated a few minutes ago is the monopoly is legal. As I understand our contention, it is legal only to a point, so that the perimeter of legality should be in some way described.

The Court: That's right, and we are going to do that by these instructions, and that is in this instruction 15. You are way afield here. I had proposed to insert after the word "Volstead Act," "and do not illegally use that monopoly."

Mr. Walker: Then is there a cut-off point anywhere in the legality?

The Court: What's wrong with that insert?

Mr. Fowle: Because that assumes there is a monopoly, and that is one of the issues.

The Court: Monopoly power, if any, if you find it to exist.

Mr. Walker: Doesn't that leave the jury in doubt as to what is an illegal use of the monopoly?

The Court: In the one instruction, yes, but you can't put it all in one instruction. [4120]

Mr. Walker: I realize that.

The Court: We have had other instructions here about this, that, and the other thing, but it is very simple to me as to what the contentions are as to the first monopoly. The plaintiff says it existed and it is legal, but it is being used, coupled with a lot of these other things, so they contend it is part of the illegality.

The defendants say it doesn't exist in fact and, secondly, if it exists, it is legal and, thirdly, their contention is it continued to be legal at all times thereafter.

You deny the whole works. There is no dispute about this thing. It is how we are going to word it.

Mr. Dixon: It is the monopoly power, Judge, assuming they have it, which enabled them to do these things, that makes their acts illegal.

The Court: I understand that.

Mr. Dixon: You can have a legal thing and use it for an illegal purpose.

The Court: I understand all about that. It isn't the monopoly itself. Let's look at the first paragraph of 15 again. On line 5, it seems to me you ought to put products fruit there. Of course, you contend this monopoly is over fresh fruit and products fruit.

Mr. Dixon: Fresh fruit is only material because if they didn't have the fresh fruit, they couldn't have the [4121] products fruit.

The Court: Is there any harm in putting the words in there, "over products fruit"?

Mr. Dixon: No. I think it would be easier to strike the word "grown" in line 6, and have "have monopoly control over the fruit available."

The Court: Why not say products fruit?

Mr. Dixon: That's all right.

The Court: Any objection to saying that?

Mr. Fowle: Well, I don't believe so, your Honor.

The Court: Nobody is going to talk about any monopoly over fresh fruit.

Mr. Fowle: I don't believe so. How are you going to do this? The only reason for this language being the way it is is I looked at the complaint, that's all.

The Court: "products fruit." I don't know whether grown adds anything. "products fruit available for processing in California and Arizona. You are instructed, in this connection, that it is not a violation of the Sherman Act, or any other anti-trust act——"

Well, strike out "Capper-Volstead," and then it will be "co-operatives, such as defendants."

Do you object to that, Mr. Dixon?

Mr. Dixon: No. That's all right.

The Court: "co-operatives, such as defendants Sunkist [4122] and Exchange Orange." You say "such as." That's all right. "to acquire or control a large or even 100 per cent of the citrus fruit * * *"

Mr. Dixon: Then you have got citrus products fruit.

The Court: "citrus product fruit grown in California and Arizona," and then I would prefer to say the statutes relating to marketing associations.

Then I would propose to add, "and providing they do not illegally use——"

Mr. Dixon: May I make a suggestion there, your Honor?

The Court: Yes.

Mr. Dixon: End the sentence there, and then talk about—because we are going to another subject, the power, if that is what you would have in mind, and I am just giving you my thoughts in an outline here——

The Court: Well, let me finish this first.

Mr. Dixon: All right.

The Court: "Providing they do not illegally use

the power arising from such a monopoly, if you find it to exist."

"Power, if any, arising from such monopoly, if you find it to exist."

Mr. Williams: Your Honor, we would object to that addition upon the ground that that implies that the acquisition and control of a monopoly is illegal if the monopoly is misused. [4123] We believe under the law acquisition and control remains legal regardless of misuse. The misuse may be an offense, but it does not reach back and make the control illegal.

Mr. Dixon: Well, that's right.

The Court: I say "providing they do not illegally use." I don't say that the monopoly then became illegal, but I say if it is misused.

Mr. Williams: That is the way I construe the provision. When you say provided, it means to me that the acquisition and control became unlawful.

The Court: Instead of putting it provided, suppose I make another sentence and say——

Mr. Dixon: "such power, if you find such to exist, may not, however, be exercised by the defendants to accomplish or effect an illegal purpose."

Mr. Williams: Didn't we say that in an instruction yesterday?

The Court: We may have said it.

Mr. Wiliams: I think it is included in one of the plaintiff's instructions.

Mr. Dixon: I think it is already there in substance.

The Court: Say it again then, "such power, if

you find——" we haven't even mentioned power yet.

Mr. Dixon: "such monopoly or control over product [4124] fruit, if you find such to exist, cannot be used by the defendants Sunkist or Exchange Orange to effect illegal restraints of trade or commerce."

The Court: No. You are lost, because we have got monopolization to go in there.

Mr. Fowle: And, furthermore, there is no charge that these defendants did by themselves make such use of any monopoly power, if it existed.

Mr. Dixon: If you believe.

Mr. Fowle: The charge is that they and some others conspired to do it.

Mr. Dixon: The point is, they can't use it themselves or in combination.

Mr. Williams: That has been abandoned.

Mr. Dixon: No, it isn't. The difficulty is, as I see it, this instruction merely states the law, and that is why it ought to stop there, in my judgment.

The Court: Let's stop there, because we have got other instructions.

Mr. Fowle: The second portion of this was intended to go a little further and take out, so far as the jury was concerned, some of what we regard as the sting in this charge and the arguments that will be made from the evidence, that somehow or other we did something or other to exercise control over the balance of the market for product oranges or [4125] the balance of the supply of product oranges.

Mr. Dixon: It is charged in the second cause of action, counsel, what you did there.

Mr. Fowle: And we didn't do it, but I just thought we ought to make it clear by an instruction to the jury that we didn't do it by attempting to expand our membership or increase our acreage or exclude anybody else from getting into the products fruit business, and so on, and I think the jury is entitled to be told that.

The Court: We will go into that in a minute. We stopped at "the statutes relating to marketing associations." Then in sorting these instructions, suppose I put in next 13, which we have already passed on. It is this one about the use of monopoly power, however lawfully acquired, and then I add at the end, "whether monopoly power existed in the defendant or defendants, and whether such power was misused is a question of fact for the jury."

I think I will solve this one by doing this. We have gone over the thing down to line 13—this is instruction 15—"do so solely through co-operative or collective action authorized by the statutes relating to marketing associations."

I propose to reject the straw man in the last part of your instruction. Now, make your record on 15 as it stands. [4126]

Mr. Fowle: If the court please, I believe we do not object to the modifications that have been made in the proposed instruction down to the period in line 14. But we do not regard what is contained in the latter portion of this instruction as a straw man. There has been an implication, and there is going

to be an argument, that in some fashion or other, because the defendants consist of a membership which grow some 65 per cent of product oranges, that somehow or other we also have a control or exercise a control or can exercise a control over the other 35 per cent, and the burden of this instruction is intended to tell the jury that even if that is so, there are certain ways in which we haven't done it.

We haven't tried to increase our membership or increase the acreage that is under the Sunkist system, or done anything of that character which in any way violates the provisions of the Capper-Volstead Act or, as you put it, the statutes relating to marketing associations.

The Court: As long as the plaintiff doesn't accuse you of those things, why inject them into the case? You are talking about what we call straw men. In other words, you have got plenty of things to talk about on the things the plaintiff is accusing you of doing without setting up here that we didn't do that, we didn't do that, and we didn't do the other thing.

You could multiply the list forever. I don't agree with [4127] you.

Any further point on that?

Mr. Fowle: No, sir.

The Court: All right. I will give 15 as indicated, namely, the first half and not the second.

16. Let me look at it a minute. I propose to reject 16 on the ground it is an instruction on a question of fact.

Mr. Fowle: May I make this proposed modifica-

tion to 16? On line—I would suggest line 10 read as follows: "from selling products oranges or power to determine prices at which others——"

The Court: Are you looking at the same instruction I am?

Mr. Fowle: Yes, sir.

The Court: 16?

Mr. Fowle: I beg your pardon. Let's go back to line 9, so that the sentence would read, as modified, in this way: "There has been no showing of power to exclude others from selling products oranges or power to determine prices at which others sell products oranges."

The Court: Or power to what?

Mr. Fowle: To determine prices at which others sell products oranges.

In other words, we would alter that sentence beginning on line 9 to read in that fashion, and submit the instruction [4128] with that modification.

The Court: All right. Now, just a minute. Strike out the word "growing," then, on 10?

Mr. Fowle: That is correct.

The Court: Then it becomes an instruction which you present to raise a question of law, and I take it the plaintiff objects to it?

Mr. Dixon: Definitely, your Honor.

The Court: It is rejected.

Mr. Fowle: Now, then, your Honor, we have an alternate, No. 16-A, which was submitted along with some other instructions yesterday.

The Court: All right. Just a minute. I have something I had crossed out of your instruction,

something written below here. I want to see what it is.

What I would do would be say something like this.

"In considering the second cause of action concerning monopoly and conspiracy to monopolize, you will determine whether the defendants or either of them had monopoly control, power and ability to exercise monopoly control over product Valencia oranges available," and so forth, "processed in California," and so forth, "if you so find, you will next consider whether the defendants acted within the so-called statutory exemptions from the antitrust laws, or whether they illegally used the monopoly power." [4129]

Well, let's pass that.

Mr. Fowle: We have instruction No. 16-A.

The Court: Where is that?

Mr. Fowle: It is an alternative instruction. It is in the group which was served and filed yesterday morning.

The Court: I have it here.

Mr. Dixon: I must have that here somewhere.

Mr. Fowle: We gave it to you.

Mr. Dixon: Oh, yes. It's in these other papers. I have it now.

The Court: The defendants submit it and are satisfied with it?

Mr. Fowle: I believe we are.

The Court: Let me read it. What is the plaintiff's objection?

Mr. Dixon: First, it ties in the production of oranges.

The Court: It is all production, but supposing you took production out. Distributing or selling.

Mr. Dixon: It is not the power to exclude, necessarily, that is the monopoly power. That is one of the tests, the power to determine the prices at which others sell. In other words, there is testimony in the record already concerning that question, but it doesn't come within the ambit of this instruction. It certainly is competent evidence. [4130]

Mr. Fowle: Let me just say this, aside from the question of production and distribution and the form of that expression—that expression, incidentally, coming from the amended complaint—this instruction is based, basically, upon one of the instructions you submitted, which says the two most important indicia of monopoly power are the power to exclude and the power to fix prices.

Mr. Dixon: Not fix prices.

The question is determine prices.

There is such a thing—I won't say price leadership, but it comes close to that, where there are two sources of supply, and they are both in the same category, independent co-operatives, and the price is established by the one who has two-thirds of the production, and the other source of supply says, We can't sell at any lesser amount and satisfy our members, so we had to take the same price.

In a sense that is determining the price by the exercise of monopoly power.

Mr. Williams: That is competition.

Mr. Fowle: I don't believe price leadership is the power to determine prices. I believe monopoly

is the power to determine prices at which others must sell.

I would just like to call attention to plaintiffs' jury instruction No. 33, which the court indicated it would give as modified slightly, which says: In considering the matter [4131] of monopoly power two ingredients are of outstanding significance, the power to fix prices and the power to exclude competition.

We have simply incorporated those two outstanding ingredients in this proposed instruction 16-A, as we think we would be entitled to do.

The Court: He says those are the two outstanding ingredients. What are the other ingredients? There could be, probably, many other things.

Mr. Fowle: If those are the two outstanding ingredients, and the jury doesn't find they exist, it seems to me we don't need to worry about the other ingredients.

This instruction is cast in such a way that before they can find the existence of the monopoly they must find the power to exclude competition and the power to fix prices. That is, to fix prices or determine prices at which others sell.

Mr. Dixon: I generally object to this, your Honor, on the grounds it is an instruction on the evidence, instead of leaving the question up to the jury.

Mr. Fowle: That leaves the question up to the jury.

The Court: Can it be revised?

As it stands I don't think it is proper.

Mr. Dixon: If they want to suggest other ingredients that constitute monopoly power, that they feel are applicable [4132] in any way, let's consider them.

Mr. Fowle: We don't think it is necessary to consider them. If they don't find the two important ingredients, which you have suggested are the important ingredients, we say they may not find the existence of monopoly.

Mr. Walker: Well, it doesn't fit the pattern of the evidence at all.

Mr. Fowle: If your proposed instruction fits the pattern of the evidence, I would say this certainly fits the pattern.

Mr. Dixon: To fix prices?

Mr. Fowle: Look at your proposed instruction No. 33.

Mr. Dixon: It is true the power to fix prices, and that is applied to your price fixing deal as one of the elements of monopoly power, which we contend flows from your contracts.

Mr. Fowle: I am at a loss to see how the plaintiff could complain about this instruction, that is, the essence of it.

Mr. Williams: Could you have a monopoly if you didn't have the power to exclude others and had no power to—what is it, fix prices?—to determine the prices?

If you lack those two things, you can't have a monopoly power.

Mr. Dixon: I have a notation here in connection with [4133] 33, that the power to fix prices refers

to the price fixing activities which tamper with or affect price structures in interstate commerce."

Mr. Fowle: That is right. That simply defines what fixing prices means, or particularizes a little bit. But it doesn't change the essence.

Mr. Dixon: Yes, it does, counsel. There is a difference.

You may fix prices by agreement with others, but determining prices is something else. You don't have to fix prices to determine what your competitors will have to charge for Valencia oranges, if they are going to compete with you, even, or stay in business. There is a difference. Price fixing is in a category, that is one of the essential elements, but you don't always have, and frequently do not have monopoly, when you have price fixing agreements that are in effect and, in fact, fix prices.

Mr. Fowle: But if you have monopoly, the whole concept of monopoly—and this is one of the reasons why it is regarded as an objectionable thing—is that the people who have the monopoly have the power to determine prices at which not only they sell, but at which others sell.

Mr. Dixon: Determine.

Mr. Fowle: I have the word "determine" in here.

The Court: I am going to change my filing system here. [4134]

Mr. Dixon: I think this is a good time to have a recess, your Honor. I don't know about you.

The Court: I will tell you what I think about this. I have been listening to you fellows argue.

Beginning with instruction 13 of plaintiff, we have some instructions about monopoly power. 13, and 32 is about monopoly, and 33 is about monopoly, 34 talks about monopoly, 35.

First let me say that I am satisfied with those instructions on monopoly, or I wouldn't have passed them. I will group those together, and then follow with a defendants' instruction, that you are instructed unless you find EOP or Exchange Orange had monopoly control or power as defined to you in the instructions, that you may not find defendants had monopoly control, unless you find that they had it as defined in these instructions. And not, then, try to restate all the parts and exceptions, and the things that are important indicia in another instruction.

And it fits in, and you get the instructions on monopoly, what they are, the law on it, and then you get the defendants' instruction.

Mr. Fowle: I would say that the defendants are definitely entitled to have an instruction as to the effect of the law on the facts of this case. If the jury is unable——

The Court: You are wrong on that. Let's get straightened out on that right now. You are not entitled, as far as [4135] that goes, to any factual instruction. The court could give the jury just some instructions on the law. I tried to even things up, where factual instructions are asked for. Like plaintiff has one stuck in now where he calls attention to certain facts. I have a flag on it as to whether I am going to give it.

All you are ent ed to is to have the law stated to the jury.

Mr. Fowle: Perhaps I misstated myself.

It seemed to me, in the light of the numerous instructions proposed by the plaintiff, and accepted by the court, with respect to the subject of monopoly, that it is fair for us to request the type of instruction that we have proposed in defendants' jury instruction No. 16-A.

The Court: If you go through those instructions that I listed, and see how they read—I am going to group those together, when I get through I will have the instructions on damages together, on monopoly, conspiracy, and then I shuffle them around so they read intelligently, and I try to even them up so they read as a group—sometimes you have little problems—I think if you go through and see those instructions, and then find this one coming at the end of it, I think you have everything you asked for, unless I misstated the law as to monopoly in those instructions.

Mr. Fowle: Frankly, I have not been able, as yet, to [4136] take all the instructions that have been accepted, either as proposed, or as modified, and try to figure out exactly what the implications of all those instructions are.

The Court: I haven't, either. We are in the same boat in that respect.

Mr. Fowle: This instruction, No. 16-A, was supposed to deal specifically with the question of what we have been referring to here as the first monopoly that is claimed. That is to say, the monopoly over

products oranges themselves. Because if there is a flaw in the plaintiff's case with respect to that—I don't say there is—but if the jury should find that there is, then all the rest of their claim with respect to Section 2 tumbles down.

Mr. Dixon: Would your contention be true as to Section 1, too?

Mr. Fowle: I think so.

The Court: You can think it over. We will go and have some lunch. But I think if you read those instructions over, which sufficiently describe the monopoly power, and then read this instruction, without repeating all the points again, they will follow it along.

There might be a preference of some order.

Ordinarily it is not counsel's business to know what order I will give them in, but I think you will see that they fit in there pretty well. [4137]

That is all you would be doing if you were restating it.

Mr. Fowle: There has been a pattern to some extent in the instructions of setting forth propositions of law, principles of law, and then attempting to apply those to this case.

Our instruction No. 16-A——

The Court: I say if you look at those, I think I named you five, two or three of them are just law, one of them is an application of facts, one of them I listed may not even be on that point, it is on something else, but then you come along with your law, and you give the plaintiff's application, and then you come along with "if they don't have

the power and control as defined," that is the defendants' point.

I don't see any sense for us to try to enumerate all the things. You would be writing a text here on the monopoly power.

Mr. Fowle: Except this one is really the essence of it. [4138]

* * *

The Court: Now, that brings us back to the instructions. As to 16-A, we have discussed it at length and we have got to come to an end sometime. I am going to reject 16-A as is and I am going to give it—my tentative decision is to give it in the following form. On line 4, strike out "production and."

On line 6, after the word "Sunkist," change the "or" [4147] to "and." That is on line 5.

On line 6, after "Exchange Orange," insert "or either of them."

Leave in the word "had" and strike out the rest of the sentence.

Add these words, "such monopoly control or power as described under the instructions I give you."

Now, make your objections. [4148]

Mr. Fowle: We object to the refusal to give defendants' jury instruction No. 16-A for the reasons and upon the grounds which were made clear during our discussion this morning.

I don't believe there is any necessity to repeat them.

The Court: No, I think we have covered them.

Mr. Fowle: We would also object to instruction No. 16-A as modified, because of its failure to include the more specific language which was included in our proposed instruction No. 16-A.

The Court: All right. The objection is overruled and I will give defendants' instruction 16-A.

Mr. Fowle: Your Honor, excuse me.

I have here a revision of 9-A, which is a little rough, perhaps, but it was the one we were talking about earlier today.

The Court: All right. Let's take a look at it.

Mr. Fowle: We have tried to redraft it in accordance with the court's suggestions.

The Court: Offhand, I would say generally it complies with my suggestion, except you have left out the actual monopolization.

You have conspiracy to restrain or monopolize interstate commerce.

Don't change anything yet. That is part of plaintiff's case. And then down below you have "were performed pursuant [4149] to the conspiracy."

You don't have monopolization there.

Maybe I am wrong, but it would seem to me that plaintiff would have a right to rely on these—well, certainly these are the same acts that he relies upon for monopolization——

Mr. Fowle: You are correct, something more is needed to cover that.

The Court: Can we do it at the beginning, after "monopolize"—"or as a part of actual monopolization of interstate commerce."

I would suggest on line 4, after the word "monopolize"—everything so far is pursuant—to insert "or as part of actual monopolization of."

Mr. Williams: Isn't that, simply, the conspiracy hasn't been successful, in essence, so isn't it included here?

The Court: Try this for size. You are contrasting pursuant to a combination——

Mr. Fowle: Might we not say this? After "commerce" on the third line——

The Court: "or as part of actual monopolization thereof."

This starts out "The plaintiff claims."

"or as a part of actual monopolization thereof."

Mr. Fowle: I was going to suggest, or that the six acts complained of resulted in an actual monopolization of [4150] interstate commerce.

The Court: They don't say those six acts alone resulted in it, but they were part of it.

Try this for size: "or as a part of actual monopolization thereof."

"were performed pursuant to a combination or conspiracy to restrain or monopolize interstate commerce, or as a part of actual monopolization thereof."

Then down on six and seven, "Each of these acts standing by itself and apart from any combination or conspiracy"—"or actual monopolization"—"was lawful."

Does this purpose and necessary effect also apply to monopolization?

Off the record.

(Discussion off the record.)

The Court: Does it follow that this purpose or necessary effect goes along with monopolization? Mr. Dixon, this is directed to you, largely.

Mr. Dixon: I am sorry, Judge. I was trying to compare this with the original No. 9. We have got something wholly different now. What was your question? [4151]

The Court: Well, you will have to go back then and see what we have done to date. On line 4, we insert "or as a part of actual monopolization thereof," and after the word "commerce" "or as a part of actual monopolization thereof."

On line 7, after "combination or conspiracy," insert "or actual monopolization."

Now we come down to the next part of it, and it says, "except as you may find," and so forth, "these acts or any one or more of them were performed pursuant to the conspiracy charged in this case."

Right there I am inquiring, can we say "or the monopolization charged"? Then does it logically follow that the next part, "and with the purpose and necessary effect," does the purpose and necessary effect apply to monopolization as well as to the conspiracy? If we can, then it is simple.

Well, I have got a better idea. Go down to line 12, after "plaintiff," the purpose and effect of eliminating competition of plaintiff, that all follows from the conspiracy. "or were performed pursuant to the monopolization of the market for citrus fruit juices." I think that will do it.

"performed as part of the charged monopolization of," and it actually would be inserted after the word "in" on line 12, instead of after "plaintiff," the way it would read. [4152]

"The plaintiff claims that the six acts complained of were performed pursuant to a conspiracy or combination to restrain or monopolize interstate commerce or as a part of actual monopolization thereof, and that it was injured by reason of the performance of one or more of these acts. Each of these acts standing by itself apart from any combination or conspiracy or actual monopolization was lawful. Except as you may find therefore from the preponderance of the evidence that these acts or any one or more of them were performed pursuant to conspiracy charged in the complaint and with the purpose and necessary effect of eliminating competition of the plaintiff in or were performed as part of the charged monopolization of the market for citrus fruit juices processed in California," and so forth.

Mr. Walker: On line 12, shouldn't that be "combination or conspiracy"?

The Court: Line 10.

Mr. Dixon: Is this now the defendants' instruction?

Mr. Fowle: Actually, it isn't any longer.

The Court: You conceded you had covered everything except that. I don't know how we are going to cover it except I have suggested this.

Mr. Williams: I have a complaint on that, your Honor, and that is that you can't have a crime of

monopolization by more than one person, one party, without the element of [4153] agreement between them. If you have the element of agreement between them, then you have conspiracy. The reason you can't have it without an element of agreement is because you would have nothing but conscious parallel action, which has been condemned by the Supreme Court. Suppose you have four persons going along parallel lines. You can't say they monopolize the field. You have to have an agreement.

The Court: I have got your point. What do you say to that?

Mr. Dixon: Your Honor, my general objection, I was prepared to argue with reference to monopolization itself being accomplished. Insofar as this case is concerned, the monopolization which we claim was accomplished in 1951 as a result of these acts was the control, I mean the accounting for a certain percentage of the total production of single-strength citrus juices.

Now, to answer your question, it is true monopolization generally, you can combine or conspire to monopolize, which means you can do it with two or more people, or you may monopolize as an individual through the normal and natural consequences of your act.

The Court: Well, wait.

Mr. Dixon: I have an objection to this whole instruction.

The Court: Williams' point is not good on this instruction, [4154] anyhow, because this instruction

doesn't touch the question of whether one or more of the defendants may monopolize. This instruction says you may ignore these six acts, so it doesn't touch this monopolization. If there is to be an instruction, it should be a separate instruction.

Mr. Fowle: Your Honor, I really believe the instruction as it was proposed originally before the modification takes care of the matter because it is true it deals only with the conspiracies, the conspiracy to restrain trade and the conspiracy to monopolize, but there couldn't have been any monopolization here by the people who are supposed to have conspired to monopolize unless there had been a conspiracy to monopolize. To deal with it as an actual monopolization merely means it was a successful monopolization.

The Court: As I understand, monopolization could come about in two ways, either by the accomplishment of the conspiracy or by the act of one individual. In other words, the actual monopolization would either be the result of conspiracy to monopolize, or it would be the act of one. If it was the act of more than one, it would have to be the result of conspiracy.

Mr. Fowle: Right.

The Court: Then with that in mind, we could leave the instruction as it is with one or two exceptions, and say [4155] "disregard such acts as being the cause or causes of plaintiff's damage based under any combination or conspiracy charge," and limit this then to combination or conspiracy.

Mr. Fowle: I understand your Honor's point, but I don't think stating it the way we had stated it originally eliminates that element you are speaking of, because if these acts were performed as part of a conspiracy to monopolize, I don't think it is going to be of any significance at all as to whether or not there was a so-called actual monopolization. If there was a conspiracy to monopolize, that is the end of the ball game.

The Court: What were you going to say, Mr. Dixon?

Mr. Dixon: I only have this to say, your Honor. I have the original 9 and I have this 9-A which we are talking about, and I have compared them. They are completely different and on different subjects. I object to this revised 9-A for a good many reasons, but at the moment I am interested so that we can go along. I understand how we are proceeding, how you want us to proceed in this matter. I would like to make this comment.

I would like to know first whether these instructions when they are revised or changes made, are acceptable and become the instruction of the defendants, or whether they are the instructions of the court? I naturally want to aid in every respect that I can the court in framing any and all [4156] instructions here. To that extent, I will, of course, direct my objection primarily to what we are considering, which I understand are your instructions, the defendants' instructions.

If the court has in mind giving certain instructions on certain things, it seems to me that is some-

thing a little bit different than what we are talking about here, because in this instance, we have a copy of this instruction in 9-A, and I don't know, frankly, what the purpose of it is, except I can see what the effect of it would be.

The Court: Mr. Dixon, I get your point, but we all want to save time.

Mr. Dixon: Right.

The Court: They propose these instructions, picking out isolated act by isolated act, and winding up with a long paragraph that you will take this out of the case. I told them I would consider one if they limited it to taking it out of consideration as part of the conspiracy, but not out of the case. It seems to me something like that is proper. Whether it is done right is another thing.

We got off onto the monopolization question, and let's terminate this by saying if there should be an instruction on the accomplished monopoly, or monopoly conspiracy, there should be a separate instruction.

The question is, ignoring the insertions I put in [4157] there, what are your objections to 9-A?

Mr. Dixon: The second sentence, clearly each of these acts standing by itself and apart from any combination or conspiracy was lawful. That is tantamount to an instruction by the court on the evidence concerning these facts or acts, to which I would not necessarily agree. I don't think it is the kind of thing that could be anything except prejudicial to the plaintiff in considering this evidence, because the natural effect of this instruction is to convey to the jury that each and every one of these

acts standing alone is a lawful act and, therefore, the net result of it is that considering them in that light, there couldn't possibly be any illegal action, because you wind up with nothing more than the entire conspiracy.

I frankly do not know of any instruction of this kind that was ever given in a conspiracy case for the very reason I have mentioned. I don't know how to further elaborate on the point, except that here in one instruction the plaintiff has got, if it is given, what they tried to get in the other five, because the court is now telling the jury that every one of these six acts, if you want to separate them and pick out the act separately, was a perfectly lawful act, which is certainly commenting on the evidence, which the court has a right to do, if you want to do it.

That is my objection to the second [4158] sentence.

Now, the rest of it merely deals with causation and a general charge, in other words, on causation would cover this point because the law is, of course, clear that the plaintiff must show that he had been damaged by some of the acts of the defendants, but it may be one or more. But the jury must find that it was one or more and that the acts damaged.

Now, it seems to me that is the way to instruct on the acts, not to pick out all of the acts, as the defendants have done in this instruction, and then have the court tell them that every one of them standing alone is perfectly legal, that the only time they become illegal is when they are done pursuant

to a combination or conspiracy, and then you must decide which one of those acts, if any, damaged the plaintiff.

I don't object to a general charge, of course, on causation, and the proper connection of these acts to damages, and that any act that damaged the plaintiff must have been done pursuant to conspiracy.

The Court: All right. I have your point.

Mr. Dixon: I feel it is highly prejudicial in this form.

The Court: I have your point. The matter comes down to this. The court has to make a determination some time as to what is a proper instruction and what is not, and I might [4159] as well make it

I am going to see how this reads by striking out this business about these acts there. If you want it with that in there, all right. If not, we will reject it again.

Leave the first sentence in. You are entitled to some instruction about these acts.

Strike out of the second sentence "lawful in itself."

I read the acts over a while back and I was going to comment then there are two or three of those acts it would be error for me to instruct were lawful. That couldn't be said about the ELP contract, but some of the others, I think it would be error to say were lawful. I am not commenting now.

Now, then, on line 7, strike out "Except as you may," and insert "you are to determine."

Strike out "find" on line 8.

"You are to determine, therefore, from the preponderance of the evidence that—whether these acts or any one or more of them were performed pursuant to the combination or conspiracy charged in this case, and with the purpose or the necessary effect of eliminating the competition of the plaintiff."

Strike out my insert, "in the market for citrus fruit juices produced in California and sold in interstate [4160] commerce."

Mr. Dixon: That I can't find any objection to.

The Court: I will reject 9-A in the form it is. I propose to give, if you want it, 9-A in the shape that I read it. You can make your record on it. In fact, I will go further than that. No. Leave it as it is. [4161]

Mr. Fowle: If the court please, we do have objections to the alteration of this first revision of instruction No. 9-A, because as it stands now it gives the jury no indication as to which way they are to go, if they find that these acts, or one or more of them, were not performed pursuant to the conspiracy.

We simply want the record to show that.

If your Honor proposes to give this instruction as modified, as long as we have our record on this instruction on the form in which we proposed it, I think we would have no further comment at all.

The Court: As I understand, you are objecting to my refusal to give 9 to 14, inclusive, and you object to my refusal to give 9-A as you submitted it?

Mr. Fowle: That is right.

The Court: But since I have overruled you on those things, you do not have any objection to 9-A as it stands?

Mr. Fowle: Except as we have——

The Court: Except insofar as that by giving 9-A as it now stands I am rejecting your previous request?

Mr. Fowle: Correct.

The Court: I am going to give the first revision of 9-A as modified.

Mr. Williams: Your Honor, we submitted a proposed instruction with respect to each of the six acts, like 9-A [4162] was before modifications—I mean like 9-A in its first revision was before modifications. In other words, there were some acts that you couldn't hold were lawful apart from any combination or conspiracy, but there were some that are. So we now request an instruction as to those that can be so held, that the jury be instructed that they are lawful.

The Court: I am not going to decide that in a vacuum. If you want to present something like that, present it, and I will look at it.

You concede some are proper and some are not?

Mr. Williams: We are not conceding it. We are just trying to conform to your ruling.

Mr. Fowle: I take it that if we had supplied an instruction in the form of this first revision of 9-A dealing with each one of the six separate acts, that you would reject all of those, as you rejected the one that deals with them collectively?

The Court: I am not playing cat and mouse with you; I might consider, after I saw it written up, something on the ELP contract, and the oral contract, and the reverse of it, EOP for ELP. But those probably would be the only two. I would have to see them in writing to look at them.

Now, 17, while we are getting ready, this corresponds to a similar one we had on the first cause, and I have done some—— [4163]

Mr. Fowle: I might say this, your Honor. We will withdraw No. 17, because No. 17 was drawn originally to deal with the attempt to monopolize, and we have a substitute, which is numbered 17-A.

The Court: I will get 17-A out. I am sorry I worked on the wrong one. 17 withdrawn.

17-A. Let me look at it.

Mr. Dixon: Are the defendants satisfied with this instruction? I mean, you don't intend to change it?

Mr. Fowle: I think in view of the court's rulings, there would have to be a change or two in who the conspirators were.

Mr. Dixon: That is the only change?

I have several objections to it, your Honor, and it will take me some time.

The Court: Wait a minute.

Mr. Fowle: We would also suggest the insertion in line 16, after the words "specific acts"—"or one or more of them."

The Court: I don't know still how to do this.

I am willing to give you this kind of a formula

instruction, but it has to be worked out like the other one.

First of all, if it is worked out similar to the way the other one was worked out in the first cause, do you have any objection? [4164]

Mr. Dixon: I don't think so, your Honor. I have said I have several objections, if this is the defendants' instruction.

The Court: I reject the instruction as it is.

Mr. Dixon: If the purpose is to help the court frame an instruction on this point, I am perfectly willing to give the court my views for whatever they may be worth.

The Court: Let's do it all at one time, because you may not be content as it is.

I propose to do something to it in a moment, and then you can make your objections to the modification and the proposals.

I am talking about defendants' 17-A. On line 6, after the words "cause of action," insert "which were incorporated by reference into the second cause."

I want to get rid of all this talk about going back to the first cause. It is true they were in the first cause, but they were incorporated by reference, and it is confusing, as I read it.

Line 10. Insert "and particularly single-strength Valencia orange juice", after the words "fruit juices."

On line 13 we are going to have to change that in there on this conspiracy. Maybe we will go back to the other one and find what language we have

got. I couldn't figure that out right at the [4165] moment.

Line 16. After the words "and conspiracy did" insert "one or more of the."

Strike out "the same specific"—so it will read "did one or more of the acts charged and complained of." Strike out "in the first cause of action."

Down on line 19 strike out "specific intent" and say "purpose and necessary effect of excluding"—strike out "substantially all"—so it will read "excluding competition."

Strike out "including that of the plaintiff."

Mr. Fowle: Your Honor, did you say "excluding the competition of the plaintiff"—is that the way it reads?

The Court: So it will read "excluding the competition of the plaintiff."

Now, maybe I can pick up from the other one the language we used.

That doesn't help me.

Mr. Fowle: May I make this suggestion? It is the five concerns that are charged.

The Court: Yes?

Mr. Fowle: And your Honor has indicated we must treat them all alike.

The Court: Yes.

Mr. Fowle: Therefore, would it not be proper to say that defendants Sunkist—just leave out "defendants," and say "Sunkist, Exchange Orange Exchange Lemon, TreeSweet, or [4166] Silzle com-

bined and conspired, and pursuant to such combination and conspiracy."

The Court: Actually you would have to have Sunkist or EOP in this conspiracy, they would have to be in, anyhow. So we will say on line 12, "defendants Sunkist and Exchange Orange, or either of them, and one or more of the co-conspirators"—"combined and conspired"—strike out "with TreeSweet and Silzle"—"and pursuant to such combination or conspiracy," did one or more, and so forth.

Have you got about what I have got, or do you want me to read it over?

Mr. Dixon: I think I have got it.

Mr. Walker: Lines 14 and 15, how does it read?

The Court: Going back to 13, it reads, "Exchange Orange, or either of them, and one or more of the co-conspirators." Line 14, "combined"——

Mr. Dixon: Leave the word "alleged" in?

The Court: Yes, "alleged co-conspirators."

Line 14, "combined and conspired."

Line 15, "and pursuant to such combination and conspiracy did one or more of the acts charged and complained of."

Mr. Dixon: Strike out "with either TreeSweet or Silzle"?

The Court: Yes.

Charged or complained of in order to acquire effective [4167] control of the interstate market for California citrus fruit juices with the specific—and so forth.

Do you object to that in that form?

Mr. Dixon: No, I don't Judge. I think it correctly states the law.

The Court: Now make your record as to why I should give 17-A as submitted, and your objections, if any, to 17-A as modified.

Mr. Dixon: I suggest the word, instead of "excluding"—"eliminating."

Mr. Fowle: Isn't "excluding" the word of art that is used in connection with monopolies?

Mr. Dixon: This is combination.

Mr. Fowle: To monopolize.

Mr. Dixon: Yes. You are eliminating the competition.

The Court: I will change "excluding" to "eliminating."

Mr. Fowle: We object to the alterations insofar as they eliminate the reference to specific intent, and insofar as to the language "excluding substantially all competition." Because in our view a monopoly or an attempted monopoly — and, of course, a conspiracy to monopolize is really nothing but a joint attempt to monopolize—intent is necessary where the acts fall short of the results complained of, and the very essence of monopoly is to engross either all or substantially all of an entire market. [4168]

Putting it a little differently, the essence of a conspiracy is to exclude all or substantially all competition from a market.

The Court: Then you may have, also, your objections heretofore made to the use of the words "purpose or necessary effect," as you have here-

tofore made them on another instruction. You may have that incorporated here.

You wanted "and" and we changed it in the alternative.

What about their point as to eliminating the one plaintiff? Are you satisfied with that?

Mr. Dixon: Eliminating competition — I don't think I got their point.

The Court: Their point was this: This was a conspiracy to monopolize, this is under the second cause, and therefore the instruction is wrong where we talk about eliminating only the competition of the plaintiff.

Mr. Dixon: As I understand the instruction, the purpose and necessary effect of eliminating competition, including that of the plaintiff—that is part of the instruction, isn't it?

The Court: No. Eliminating competition — all right. If that answers their objection, leave the words "including that of the plaintiff."

Mr. Williams: We still have objection to "substantially all" being left out. [4169]

The Court: Any other objections?

Mr. Fowle: I believe not.

The Court: I will give 17-A and overrule the objections.

Are you satisfied with 18? I propose to reject it. I just want to know whether you want to do anything before I reject it.

Mr. Fowle: I would believe, in view of the discussions that have taken place heretofore, and in

view of your Honor's views with respect to a similar instruction earlier in the series——

The Court: That you will let it stand as is?

Mr. Fowle: Yes.

The Court: You may incorporate all your objections heretofore made to a similar instruction——

Mr. Fowle: As a matter of fact, I do have this suggestion, come to think of it. We did have some modifications of this proposed instruction for this reason: It was prepared in the beginning to deal with an attempt to monopolize, and we had, therefore, made some alterations on the face of it, which directed it at the conspiracy to monopolize, rather than the attempt to monopolize, so that it would have read this way:

"You are instructed that the specific acts charged in the second cause of action to have been done pursuant to the alleged conspiracy to [4170] monopolize must have been done for the purpose of monopolizing and with the specific intent of excluding the plaintiff as a competitor,"

and so on.

The only other change was down in line 11. After the phrase "but that" we would suggest inserting the words "monopolization and." And then changing the last word in that line from "was" to [4171] "were."

Mr. Dixon: What are you talking about? 25-1?

The Court: 25-A. Have you got one to submit on this?

Mr. Fowle: No. This is 18.

The Court: You haven't given us anything? You are just reading?

Mr. Fowle: I was simply reading certain revisions in our proposed Jury Instruction 18 as you have it before you to bring it into conformity with the amended complaint which now calls it conspiracy to monopolize rather than an attempt to monopolize. This instruction having been prepared before the complaint was amended, I do this to eliminate the allegations with respect to the attempt to monopolize.

The Court: Well, I don't know how it will read. Better go slowly over it again before I reject it. What do you insert?

Mr. Fowle: After the words "second cause of action" in line 4, insert the phrase "to have been done pursuant to the alleged conspiracy to monopolize."

The Court: Then what is next? Did you strike something?

Mr. Fowle: After the word "done" in line 4, "for the purpose of monopolizing."

The Court: Well, what you want in here is specific intent, isn't it? You want to make the record on specific intent?

Mr. Fowle: Yes, that's right. [4172]

The Court: Well, I am going to reject it, so I suggest, to save time, you type up whatever you want as 18-A and we will look at it then. There is no use spending the time copying this, because I have already ruled on this question of specific intent. You can submit another one, if you want, that

will take care of this provision and still raise the point which you want to preserve.

Mr. Fowle: All right, sir.

The Court: 19?

Mr. Fowle: That is withdrawn.

The Court: All right. 20?

By the way, these others that you submitted, do you have alternate numbers?

Mr. Fowle: Yes.

The Court: If you have alternates, call my attention to them.

Now we come to another one of these series in the second complaint like you had in the first. I think they are 20, 21, 22, 23, 24 and 25. They are the same kind of series, apparently, as 9 to 14 was.

Mr. Fowle: Even as they stand now, your Honor, they need slight modification to bring them in line with the second amended complaint, which eliminates the attempt to monopolze.

The Court: Do you withdraw them at this time? If they [4173] need modification, you better withdraw them.

Mr. Fowle: The modification is really quite slight. It is almost exactly the same phrase at the same point in each one.

The Court: I reject 20 to 25. You can make your record on them, and again you have the same problem we ran into with 9 to 14. We have some kind of pattern of what I would propose to give, if you want something on the second cause, like we had on the first. If you do, I would like to have it submitted. Make your record on 20 to 25.

Mr. Fowle: Well, I don't believe it is necessary to say anything more than was said this morning.

The Court: You incorporate here the matters of discussion, particularly under 9 to 14, and 9-A, along in there?

Mr. Fowle: That is correct.

The Court: And, as a matter of fact, any other discussion we had which bears on the problem here?

Mr. Fowle: And we may wish to submit a single instruction incorporating the essence of these.

The Court: Yes. I think I am right, that 20 to 25 are all the same kind, aren't they?

Mr. Fowle: Yes, sir.

The Court: All right. Now, 25-A?

Mr. Dixon: That should be withdrawn.

The Court: It is out? [4174]

Mr. Fowle: Yes. That is the Robinson-Patman Act. 25-A is withdrawn. 25-B, I believe, is still submitted. That does not deal with the Robinson-Patman Act.

The Court: 25-B. We have got 25-1 over here somewhere.

Mr. Fowle: That deals with a slightly different subject. Actually, that deals with the Hyland Stanford contract. We can come to that later and handle it separately.

The Court: All right. 25-B. Let's read it over. Well, in the form it is in, I propose to reject it. Whether it could be dressed up or not is another question. I would reject it for the reason that in the paragraph where there is reference to the eliminating and suppressing interstate commerce, it

should be the purpose or necessary effect. That appears a time or two. And for the reason that at the very bottom line it says "TreeSweet and Silzle," and this is in the way of a formal instruction. It would have to be "TreeSweet or Silzle," and so forth.

What is the plaintiff's position?

Mr. Dixon: This instruction, your Honor, certainly we object to it on the ground that, first of all, it does not state the law, and, if it did, there would be no limit to the right or the extent to which any co-op, so-called, could control the prices and use to which products purchased from it could be made after they were acquired. Just based on the fundamental law in that respect, once you sell something, you [4175] can't determine how it shall be used, unless you have got a patent, and even then, under the recent decisions of the Supreme Court on efforts to control resale of patented articles, that has been frowned upon, and in practically all instances it was held to be illegal.

In this instruction the defendants are seeking to get the court to instruct the jury in this case that, regardless of what they did, it was all right because they could have sold oranges to TreeSweet for processing purposes at any price they chose as long as they were used for processing purposes, I mean for processing to single-strength juice. They could have sold to Hyland Stanford at a different price on condition only that Hyland Stanford process them into pasteurized concentrate. And to another purchaser at a different price yet provided they

were used only for processing into frozen concentrate.

I think to state the situation is to indicate the utter unreasonableness, shall we say, of such practices, which I am certain never had any specific authorization in any of the marketing acts of Congress, and certainly, in my judgment at least, would not be approved by any court.

Mr. Williams: Your Honor, counsel's objection goes to the validity of an agreement between the seller and the purchaser that would limit the purchaser in his use of the oranges. This instruction does not in any way pass upon the [4176] validity of such an agreement. This merely says it is lawful for them to sell it at two different prices, and doesn't take the next step and say it would be lawful for them to agree with the purchaser that the purchaser must abide by a restriction on use. This was exactly the situation in the Maryland-Virginia Milk Association against United States. They argued there that the two-price system was unlawful, and the court held that it was not.

The Court: I don't know whether you can dress anything up on this or not. I have doubt about it. But 25-B is rejected as it is. Make your record on it.

You can try over the week end to see what you can do with it. I have already told the jury that, bear in mind that I have already told the jury that these defendants could process until the cows come home. I have already told them they could make contracts with independents if there weren't this, that, and the other thing. I take it that what you

are shooting at there is the so-called two-price system.

Mr. Fowle: True. This was a difficult instruction to draft.

The Court: Are you going to argue the two-price system at all? If you are not, there isn't much urgency in the case.

Mr. Dixon: I don't know what you mean, Judge. The two-price system, I am going to argue certainly—of course, this isn't in the case, they didn't do this in the first place, as [4177] such. There is absolutely no evidence whatever to my knowledge in the record in this case upon which this kind of an instruction could possibly bear or have any place. It relates to the right, as I read it, of a co-op to do certain things in selling its product, namely, to sell it at two or three different prices, apparently, as it pleases.

There is no evidence in this case that that is what they did as such. The price was $40 for fruit. That was it, the one price. They did sell some for $22 under the Silzle contract, about 500 tons.

Mr. Williams: We don't concede that.

Mr. Fowle: It is going to be the position of the plaintiffs here that oranges were being offered and sold at one level and that contracts were being entered into with certain processors which permitted them in effect, this will be the claim, to get either oranges or the equivalent at a figure which brought back to Exchange Orange the lesser price than the price at which Sunkist was offering oranges for, say, in the market.

That, we say, is very similar to the two-price system which was before the court in this Maryland milk case. It was charged that the two-price system there, where they sold one kind of milk at one price for one purpose, and another kind of milk, skim milk——

Mr. Fisher: No, it was the same milk. [4178]

Mr. Fowle: ——the same milk for different purposes at a different price, it was charged there that that was a price-fixing scheme and was done with the purpose of restraining trade.

The Court: It is not charged here there is any violation as part of a price-fixing scheme. It is charged that the TreeSweet and Silzle contracts were, but it isn't charged that the others were. The only thing that Bireley——

Mr. Dixon: They bought at the regular price, Judge, in the first place, and there is no evidence in this case at all, to my knowledge, that the defendants ever offered publicly to make oranges available to processors of single-strength juice at $22 a ton.

In the milk case, anybody could get it if they wanted to.

The Court: Nor did they publicly make available the processing contracts.

Mr. Dixon: No.

Mr. Fowle: But there is evidence in the record that the $40 price was fixed with the view in mind that oranges could be bought by certain processors at that price if they were to process those oranges into a certain type product, whereas, if oranges

were to be bought by purchasers for single-strength orange juice, they would have to be sold at a lower price. That was not only true of Sunkist, but Morgan Ward, and he solved the problem in the same way. [4179]

Mr. Dixon: There is no evidence in the record to that effect, counsel, that Sunkist or EOP, to my knowledge at least, ever offered to make these contracts pursuant to which a processor like the plaintiff could get access to oranges on a basis where they would pan out to be available at, say, ten or twelve dollars a ton, as they were to TreeSweet and Silzle, or fifteen, whatever it was.

The Court: Anything further you want to add in behalf of 25-B? I will still consider, if you want to look it over during the week end and see what you want to do about it, but I have serious doubts about it. You can take another stab at it. I am not going to take the time now, because it is [redacted]remote.

Mr. Fowle: All right.

The Court: Anything further you want to add? Rejected.

* * *

The Court: All right. Are you content with 34, or do you have a revision of it?

Mr. Fowle: I think we are content with 34.

The Court: Let me read it again.

I propose to reject 34 in the form it is in. I might, [4180] with certain changes, give that part of it down to the period on line 12.

I also would give some summary form of its contentions. However, it must be in summary form,

your theory and contentions, and not specific things. You know what I mean. Like the plaintiff did. You have got more to put in yours than the plaintiff, it would be longer, because, like the old tort case about the pot, you say you didn't steal it, and if you did steal it, it was broken, and finally there wasn't any pot at all.

In other words, you have got whatever you want in that respect, but I am not going to discuss evidence in connection with either the plaintiff's contention or the defendants'.

When I first went over it, what I had was to strike out the latter part of it; the first part down to about 12, with some changes of wording, largely might be proper.

Mr. Dixon: The word "substantial" isn't proper, certainly, in line 11. That isn't the language of the cases.

The Court: No. The question isn't substantial cause. In fact, I scribbled on it at the time I was going over it, "This isn't good."

"The burden is on them to prove that the plaintiffs' loss or damage was caused at least in part by the action of the defendants. The plaintiffs need not prove defendants' acts were the sole cause if other changes and happenings may also [4181] proximately have contributed."

Incidentally, I have laid aside these instructions on proximate cause. We still have to get one on that.

"If, however, no wrongful act or conduct of de-

fendants contributed proximately in any way * * * then the defendants are not liable to the plaintiff."

This is in the way of proximate cause. Also, it involves the question of sole cause or other contributing causes.

Mr. Fowle: We wouldn't argue about the word "substantial," your Honor. This instruction is based to a considerable extent on Judge Wyzanski's instruction to the jury in the cranberry case, where he explained to the jury the various causes that might have resulted in the plaintiff's injury in that case, just as we have attempted to do in this instruction.

The Court: Let me see what I can do on the first part. [4182]

Mr. Fowle: We wish to change the word "substantial" to "the proximate cause of any injury."

The Court: "a proximate cause."

On line 7, after the word "extent," maybe Judge Wyzanski liked the words "circumstances which befell," but I would strike that out and say, "to what extent"—insert "plaintiffs'"—strike out "are" and say "plaintiffs' alleged injury is attributable to the wrongdoing of the defendants."

And then on line 11, strike out "substantial" and say "proximate cause."

Offhand I think that part of it is all right.

Does plaintiff have any objection to that part of it?

Mr. Dixon: How does that read now?

The Court: "to what extent plaintiffs' alleged

injury or damage is attributable to the wrongdoing, if any * * *'' That is the way it reads now.

Mr. Dixon: Does the words "if any" come in there again?

The Court: This doesn't go all the way.

Mr. Dixon: I see.

The Court: This is proximate cause, really. If you find there is proximate cause, then you have to still find whether there was injury and damage, and so forth.

Mr. Fowle: If the court please, I believe you indicated a moment ago that the defendants would be liable to the plaintiff in damages even though the defendants alleged [4183] wrongdoing was not the sole proximate cause of the injury.

The Court: Right.

Mr. Fowle: I don't believe that is so. I believe if the injury was caused in part by the alleged wrongdoing of the defendants, and in part by some other cause, that the defendants would not be liable for all the damages that resulted from the different causes.

The Court: Well, I don't know. You are in the tort field. If you have got causation, tort feasors cannot talk about how they are going to apportion damage.

Mr. Dixon: Judge, here is the way it is usually done. Up to the first part it is correct. You determine whether they violated the antitrust law, then if you decide that they have, then you should next consider whether such acts of the defendants con-

stituting the violation were the proximate cause of any damage suffered by the plaintiff.

In other words, the act complained of must cause the damage.

Then the instruction would follow on what constitutes proximate cause. And then, of course, having determined that the acts were committed, and that there was a proximate cause of some injury, then you will determine the extent of the damages, if any.

I mean in that logical order.

The Court: Technically I hope we don't have to get into [4184] this, but technically you have exactly the same problem I wrestled with in that Marshall case, and we had an old Idaho case saying there can be only one proximate cause.

Actually, you have the foreseeable test as to other forces and happenings. If they were foreseeable, then the defendant is liable for the whole business. If they weren't foreseeable, then the defendant is not liable. If the unforeseeable cause came in, it broke the chain of causation.

That is what you really have got if we have to go into it.

Mr. Fowle: I know this gets the whole thing pretty complicated, but in Judge Wyzanski's charge to the jury in the cranberry case he went into this very question. He said, "You may decide that the wrongdoing of the defendant in that case, or defendants, was only a part of the cause of the damage here, some of the damage may have resulted

from other things, in which case you ladies and gentlemen of the jury will have to make up your minds to what extent the defendant is liable for what happened here."

Mr. Walker: I happen to be looking at that case right now. Does the court want it?

The Court: His instruction, with all respect to Judge Wyzanski, wasn't technically correct, if you want to get down to it.

In certain instances, it is true, some other cause, an [4185] unforeseeable cause, wouldn't be chargeable to the defendant, but a foreseeable cause would be. If we get into all that, we have a heck of a thing. For instance, suppose it was foreseeable that the plaintiff was a little hard up for money, and because it was hard up for money, it lost contracts and eventually went broke. Now, unless this being hard up for money was the thing you assume was the cause of the injury, if a proximate cause here is attributable to the defendant, and if it was foreseeable while the defendants were doing the acts that they were doing, that the plaintiff might become hard up, then the fact that it became hard up and it went broke was a foreseeable cause and doesn't relieve defendant of liability.

Mr. Williams: Here we have the problem whether it was foreseeable that Morgan Ward would refuse oranges.

The Court: If we say a proximate cause here, maybe we solve it.

There isn't a lot of difference between what you

state down to line 12 and what Dixon suggests. I like it better.

If you first find it violated the antitrust law; secondly, you then see whether or not the acts complained of, or any one or more of them, caused the the plaintiff damage; and then whether or not that act was a proximate cause.

Mr. Fowle: Well, the portion of this instruction that is incorporated in that part of it down to line 12, I agree [4186] can be stated in many different ways. That was simply an introduction to the balance of the instruction. I agree that the first part of it can be stated in many ways, and if all the rest of it is going to be rejected, I have forgotten what Mr. Dixon's instruction says at the moment, but it may be adequate. Perhaps not.

The Court: I will dictate something to my secretary.

This is a revision of 34. Copy what is marked as "A," which goes down to the word "consider" on line 7, and then I will dictate:

"Whether or not one or more of the acts complained of by the plaintiff resulted in injury or damage to the plaintiff, you will next determine whether or not the violation of the antitrust laws, if such you find, and the commission of the act or acts complained of, if such you find, was a proximate cause of any injury which the plaintiff may have suffered."

Does that do it?

We will lay 34 aside.

Do you want to make any record on 34 as is?

I am rejecting it as is.

Anything more than what we have said?

Mr. Fowle: I might make just this one statement, that we believe that we are entitled to an instruction in either that [4187] form or a somewhat similar form for this reason: that instructions are going to be given, I gather, in this case, that deal with principles of law, and which, in addition, apply those principles of law to the facts of the case, not in great detail, but in some detail, and since a fairly substantial part of this case was taken up with evidence which we believe shows or tends to show that the misfortune of Winckler-Smith company in 1951 was due to causes other than the alleged wrongdoing of the defendants, we think that it would be proper to instruct the jury that if they find that the fact that the plaintiff went out of business in 1951 was due to some of these other causes, naming them, then the defendants would not be liable.

The Court: All right. The objection is overruled.

Where do we go now, to 14-A?

That is the next one that I have that hasn't been acted upon.

Mr. Fowle: Yes.

The Court: Are you offering it?

Mr. Fowle: Yes, sir.

The Court: A lot of this has been covered by instructions pointing out that the plaintiff must

prove this conspiracy and must prove that things were done for the necessary effect, and so forth.

The instruction is wrong as a matter of law, in line 16, [4188] where it is charged with being of no consequence in the case, where you take out of the case a bit of evidence which may be considered for other purposes.

I propose to reject it.

What is the gist of what you want to say by 14-A?

Mr. Fowle: The gist of this, your Honor, is by the second amended complaint the plaintiff added to its charge a charge of price fixing. That was new in the case as far as we are concerned.

You say we are competent counsel and we should have been able to figure this out. I think there is a little bit more to it than that.

It was the first time that price fixing was pleaded in the case. It is, therefore, the first time that we knew that it was going to be in the case as far as the pleadings are concerned.

Now, this instruction deals with the matter of price fixing, and it says, in effect, that unless you find that price fixing was done here pursuant to the conspiracy, and with the purpose and effect of eliminating the competition of the plaintiff, the whole matter of price fixing doesn't belong in the case.

And that is our view.

The Court: Does plaintiff object to this instruction?

Mr. Dixon: Yes, definitely. [4189]

Mr. Fowle: We go on to say, in addition to that, that in any event the charge of price fixing should play no part in this case, unless the jury finds from a preponderance of the evidence that Sunkist or Exchange Orange entered into an agreement with TreeSweet or Silzle to fix the prices at which those two companies resold the products.

The Court: There, you see, you are wrong, because if they conspired to eliminate the plaintiff, and if the purpose or the necessary effect of what they did was to eliminate the plaintiff, it is proper to be considered.

Mr. Fowle: But plaintiff doesn't claim it was the purpose or necessary effect—that that was the purpose or the necessary effect, at all. They don't claim that. I am sure of that. They don't claim that price fixing had anything to do with the elimination of the plaintiff. As a matter of fact, price fixing would have helped the plaintiff.

The Court: What was the plaintiff's instruction that you were looking at when you drew this?

Mr. Fowle: I wasn't looking at one of his instructions; I was looking at the Second Amended Complaint.

Mr. Dixon: This instruction I think should be read in connection with plaintiffs' 27, your Honor. In a sense it is an attempt to deal with the same subject matter.

The Court: The instruction has three parts in it, plaintiffs' 27. First you are to determine. That just presents [4190] the question. The second sentence is a statement as to the law.

Mr. Fowle: Are we talking about plaintiffs' 27 now?

The Court: Yes. The third sentence is, If you find, and so forth.

Now, I will give the reverse of that third sentence and run it right in behind here.

That is the way instructions ought to go, anyhow.

The first paragraph of 27 presents the question; the second sentence states the law; and the third sentence says, If, therefore, you find the 1951 Tree-Sweet or Silzle contracts had the necessary or intended effect of fixing or tampering with price structures, you may consider such fact in determining whether there was a conspiracy, and so forth.

I could say: If, on the other hand, you find that neither of the '51 TreeSweet or Silzle contracts had the necessary or intended effect as indicated above, or whatever it is, then you may not consider——

Mr. Dixon: You should not consider it in determining whether or not there was the conspiracy charged by the plaintiff.

I have no objection to the addition, Judge. [4191]

The Court: Do you see what I am thinking about?

Mr. Fowle: I see what you are thinking about, yes, Judge, but we still take the position that the whole charge of price fixing is something brand new in this case as of the date of the amended complaint, so far as the pleadings are concerned, and we con-

tend if it is going to be in the amended complaint, that there ought to be an instruction to the jury that they must find it was done pursuant to the conspiracy charged in the first cause of action, and with the purpose and effect of eliminating the competition of the plaintiff. Otherwise, we feel it has no place in the case at all.

The Court: Well, you have got a lot of stuff in here to start with about what is charged.

Mr. Fowle: Yes.

The Court: You have another instruction which this would follow.

Mr. Fowle: That simply summarizes what we are charged with in the complaint. I believe it is an accurate summary of the charge. We are saying in effect here in this instruction that if the jury doesn't find that the alleged price control and elimination of competition charged in the complaint was accomplished pursuant to the conspiracy charged in the first cause of action, that the jury should disregard the charge, and I think they should, and we are saying next [4192] that if they do find it was part of the conspiracy and was done with the purpose and effect of eliminating competition of the plaintiff, then they should not find that there was any price fixing or elimination of competition unless there was an agreement to that effect in this case.

I take it that the suggestion that there is price fixing here is double-barreled. I mean there has been some talk of price fixing between Exchange Orange on the one hand or TreeSweet and Silzle on the

other hand with respect to the prices at which those two concerns resold to the public.

There is also a suggestion that the TreeSweet and Silzle contracts themselves are price fixing just in their very nature.

Now, you will notice that in the last portion of this instruction we deal with both those problems. We say that the jury shall not find there was any price fixing as far as the resale by TreeSweet and Silzle of their products is concerned unless there was an agreement to that effect between those two concerns and Sunkist.

We also say that as far as the contracts are concerned, that you shall not find that they had the effect of price fixing unless you find that the discount at which oranges were sold to those two concerns was so narrow as to forbid price competition between the buyer and the seller.

The Court: Is this the only instruction you have on [4193] price fixing, 27?

Mr. Dixon: I think so, your Honor.

Mr. Fowle: On the contrary, the plaintiff has several proposed instructions on price fixing. In fact, so many that we objected to the overemphasis on the subject a couple of days ago.

The Court: 29 and 30.

Mr. Fowle: Perhaps it would simplify this problem if we redrafted 14-A to put it into three separate instructions. I don't really think it is necessary to do it, but it might flush the three problems we are dealing with, perhaps, a little more clearly.

The Court: Well, redraft it. Have you followed

the language of the complaint in your first sentence?

Mr. Fowle: I certainly intended to, and I believe I have. That is the second amended complaint.

The Court: All right. That could be put in. I might use it as lead instruction to the whole price fixing subject.

Mr. Dixon: I think there, if it is used, Judge, so it just wouldn't be confusing—of course, with the other instructions, I don't see why that should be. It is charged, of course, it is true it is one of the allegations of the complaint in that sense, but it is not one of the charges relied upon in this case as being the cause of the damage. [4194]

Mr. Fowle: Well, it is nonetheless in the case. We are charged with it. We can't figure out the reason why you are charging us with it.

Mr. Dixon: I think the instruction shows why.

The Court: All right. If you want to split it up, try again.

Take the first sentence, but also either you add or I am going to add the point Mr. Dixon just made. Although this is the charge, it is not one of the six acts complained of.

Then if you revise the second part—I will not approve this business about it being of no consequence in the case. That would have to be changed.

The last part, where you disregard the charge, that should be worked out as a corollary to 27 and 28 in there where you have if you find one way and if you find the other.

I will reject 14-A as it now stands and overrule the objection.

14-B? This is a question of law.

Mr. Fowle: Correct.

Mr. Williams: A question of fact for the jury, is our position.

Mr. Dixon: That is what they have tried to make it. It is our contention this instruction should be denied and we [4195] would object to it on the grounds that were previously urged and set forth in our previous discussion on this same matter.

The Court: I am going to take the position that is a matter of law and not a matter of fact, and reject it.

Mr. Fowle: I take it we need to do nothing further than say we object to the refusal to give this instruction on the grounds we think the evidence warrants it.

The Court: Yes.

Mr. Williams: We can embody the argument on the motion for directed verdict which discussed this point, can we?

The Court: Yes, that is a good point. You may.

16-B is the next one I have.

Mr. Fowle: Well, we got a little bit out of order in discussing things. This was one which perhaps should have been discussed a little earlier when we were dealing more specifically with the second cause of action.

The Court: I think it is a correct statement of law. Any objection to it? It is a general statement of the law.

Mr. Dixon: I am not sure that is quite correct, your Honor, even as a statement of law. Is this a quotation from this case?

Mr. Fowle: Well, it is substantially a quotation.

Mr. Dixon: I don't recognize it, if it is, counsel. That is why I am asking the question. I don't think it is. [4196] I think what you have done is take out of this decision some things and worked them into a statement which in my judgment is not a complete statement, put it that way.

Mr. Fowle: Well, some professors write 30 and 40 page law review articles on this subject.

Mr. Dixon: That's right. You have "with the purpose of monopolizing" in here. That is why I asked if this was a quotation and, if so, what part of this decision is it from. This could only have application to this case to the conspiracy to monopolize or combination or conspiracy to monopolize, as indicating what such a conspiracy or combination would be. It is not a definition, certainly, on the law of monopolization, effective monopolization, in other words, a fait accompli.

That is why I say I don't think standing alone it is a correct statement.

Mr. Fowle: Well, I believe it is a correct statement of the law. I think any objection from the plaintiff should point out more than just that it is not a *correct of* the law. I think the objection should be more specific than that.

Mr. Dixon: For example, your Honor, we have heard a lot in this discussion about Judge Wyzan-

ski in the cranberry case. I have a lot of respect for him.

Mr. Fowle: He says much the same thing.

Mr. Dixon: Here is his exact language in the opinion on [4197] to monopolize.

"To monopolize"—that is the conspiracy to monopolize, the combination we are talking about—"means to take steps toward acquiring a dominant position in the market and to take such steps when they are not encouraged by the law."

For a simple statement of to monopolize, I think that standing alone is perhaps as good a statement as you can get. If you want to elaborate on what is meant by to monopolize——

The Court: Do you find that in the Griffith case?

Mr. Fowle: I am not able to find it right now.

The Court: Is this slanted toward the conspiracy to monopolize or the actual monopolization?

Mr. Fowle: It is slanted toward both, your Honor.

The Court: Well, monopolize means only a conspiracy.

Mr. Dixon: Monopolization is quite different from to monopolize.

Mr. Fowle: I have got the term "monopolize." I have simply said here is what the word means as it is used in the statute.

The Court: It is only used in this case in connection with the conspiracy to monopolize.

Mr. Fowle: But a conspiracy to monopolize is a conspiracy to do the very thing that is forbidden

in the statute, and the statute uses the word monopolize. This was an [4198] effort merely to give the jury what we think is the proper meaning of that word "to monopolize."

The Court: Let's see the book you have. Haven't the courts attempted to define monopolize and monopolization?

Mr. Fowle: They have, and they frequently do it rather differently. I can't remember whether it came from this page or not. But it came out of there somewhere (handing volume to the court).

Mr. Dixon: This is a very restricted definition.

Mr. Fowle: What's wrong with it?

Mr. Dixon: I tried to tell you, counsel, some of the things I think are wrong with it. The term "to" is left out. I don't want to be pedantic or anything, but it is important.

Mr. Fowle: Let's put the word in. I don't object to that.

Mr. Dixon: Then I still wouldn't agree to the definition. You asked me what I thought was wrong and I am starting out to tell you.

Mr. Fowle: I haven't heard anything else you think is wrong with it.

Mr. Dixon: "follow such a course of action with the purpose" you have got in here. Purpose, intent, is injected into the thing again. You just do not charge intent under the Sherman Act.

Mr. Fowle: This is the specific intent now. This is [4199] the purpose of monopolizing.

Mr. Dixon: You don't elaborate. That is another objection I have to your definition. I think Judge

Wyzanski's definition of to monopolize is as good a statement as you want.

Mr. Fowle: As you know, there is a lot more to what Judge Wyzanski has to say about monopolization than that.

Mr. Dixon: No, there isn't. He defines it and then he goes on and says there is nothing unlawful about getting 100 per cent as applied to the case, yes, but that is his definition, as I remember the case, at least.

The Court: The language in here, of course, is no particular definition. For instance, if Section 2 of the Act is aimed inter alia at the acquisition and intention of effecting market control, among other things—that is one thing.

Then it says, hence the existence of power to exclude competition when it is desired to do so is a violation, provided it is coupled with for the purpose and intent of exercising power.

Unreasonable per se to foreclose competitors from any substantial market.

Antitrust laws are as much violated by prevention as by destruction.

Then the classic statement, use of monopoloy power to foreclose competition, to gain a competitive advantage or [4200] to destroy a competitor is unlawful.

I would like to have a definition of to monopolize as used in the conspiracy part, and monopolization as used in the other part of the plaintiff's case.

Mr. Dixon: Monopolization, Judge, as such, of course, covers a lot of things, but it means, as the

Supreme Court has indicated, I think in the Griffith case and others, domination and control over a market. In other words, you start with that generally. I mean it is hard to make an abstract simple definition, but certainly those two elements are always present.

Then you start from there and you say those constitute monopoly power. Then you decide or have to decide, was that power or monopolization lawfully acquired, because it still might have been lawfully acquired. You get it in public utilities, and so on.

The Court: Then where do you go from there?

Mr. Dixon: Then you determine the question: Was the power used to exclude, I mean to restrain trade under Section 1, which would constitute a violation, not necessarily of Section 2, but of Section 1, and under 2, to monopolize by excluding all competitors from that market. In other words, somebody wants to come into that market after you have got your monopoly position, and you say, "Oh, no. I have got the monopoly here over the product, for example in this case, [4201] that you need to continue to process or to come into this market to sell juice in competition with me, and I will exercise it by depriving you of it."

That is where an exercise of the monopoly power which may be perfectly legal becomes illegal.

Mr. Fowle: As a matter of fact, I wouldn't quarrel very much with what Mr. Dixon has just said. The emphasis should be upon the purpose and the effort to foreclose all or substantially all of the market.

The Court: Dixon's remarks are going to be available for you. It sounded kind of logical to me. I think you have got to go further. It seems to me you have got three problems here. If somebody can come up with proper instructions, I would like to give them.

You have got, one, to monopolize as used in the conspiracy charge. You have got monopolization as used under the other theory of the plaintiff, and as set forth in the second amended complaint. They are two different things in a way.

Thirdly, you have got the point you gentlemen raise which, if you want it, and it is good law, ought to be given, that is that monopolization results either from the act or several defendants as the result of a conspiracy or combination, or results from the act of one defendant alone by what he himself does. [4202]

That is your contention, is it?

Mr. Dixon: I think it is very well stated in brief form, your Honor.

The Court: So I reject at this 16-B. Have another crack at it. I think that you could well consider all three problems. [4203]

* * *

25-1. Is this submitted by the defendants?

Mr. Fowle: Yes, it is. In order to expedite consideration of it, I might simply say that this instruction has to do with the problem that is raised by the second amended complaint and the allegations therein concerning the Hyland Stanford contract. I

might point out, incidentally, that there is a reference here to Hyland Stanford alone and not to Hyland Stanford and General Foods, or the Bireley Division of General Foods, because in the case of Bireley's, there was no agreement with Sunkist or EOP which could in any way be said to foreclose the market to anybody. Sunkist or EOP did not have the so-called first call on the Bireley's facilities. There is no contract to that effect in evidence.

The Court: Let me read it over.

Are you looking at the complaint?

Mr. Dixon: Yes.

The Court: Did you allege that Hyland Stanford had first call?

Mr. Dixon: The complaint alleged that Hyland Stanford and General Foods—those contracts are right outside. I think I have copies of them. There is one of them that was, I think, different.

(Discussion had off the record.)

Mr. Dixon: Judge, I must apologize. Mission Dry should be inserted here, instead of General Foods. That is on page 14, line 17, of the Second Amended Complaint.

This was drafted on a Sunday, and I did not have——

The Court: Page what?

Mr. Dixon: Page 14, line 17, the words "General Foods" should be stricken, and in place thereof should be substituted the words "Mission Dry."

The Court: Then Hyland Stanford remains in?

Mr. Dixon: Yes.

And if it is in order, I would like to ask leave to amend the Second Amended Complaint to conform to the changes requested.

Mr. Fisher: Your Honor, we would object to that, and we object to it on the same grounds that we objected to it [4205] when the motion of the plaintiff to file the amendment was first presented to the court, and we would ask that the same objections which we raised at that time be incorporated by reference at this time.

The Court: They may be incorporated.

Objection will be overruled. It will be permitted. But may the same limitation that was made on it at that time also apply?

Mr. Dixon: Yes.

The Court: Namely, that this can't be argued as any act of causing damage, but is purely part of the background material developed during the case?

Mr. Dixon: We so stipulate, your Honor.

The Court: And whatever limitations I placed on it at that time will also be incorporated.

Mr. Fisher: I make the further suggestion that here we have had a number of suggestions today, so it seems to me we should get a Third Amended Complaint that incorporates all these changes.

The Court: Well, these are mostly insertions of words. There is no change of any allegations. Striking out "defendants" and putting "co-conspirators" here is merely the naming of one company that was named by mistake.

Your request will be overruled.

That still leaves us with Hyland-Stanford [4206] here.

Mr. Fowle: Mission Dry will have to be incorporated in this proposed instruction.

The Court: Let's see if we can do something here.

After the words "Hyland-Stanford," on line 7, insert "and Mission Dry."

On line 7, "these companies."

Do they both pack hot concentrate?

Mr. Fowle: Yes.

Is that right?

Mr. Walker: Yes.

The Court: The next line, "processed and sold by them instead of "it."

And on line 10, it should be "companies."

Line 15 "Hyland-Stanford and Mission Dry."

Mr. Dixon: May I make a suggestion, then, your Honor, if this is the court's instruction?

The Court: No, we haven't gotten that far yet.

You changed your complaint, and I granted the motion. Now we have got an instruction, and for fair presentation it should conform to the amendment. Is that it?

Mr. Fowle: Yes, correct.

The Court: Now, it takes care of both Hyland-Stanford and Mission Dry?

Mr. Fowle: I think that is right.

I know that your Honor does not approve of this phrase [4207] "disregard such contracts as being of no consequence in this case," however it makes it difficult for the defendants to frame their objec-

tions, because in this particular case the amended complaint does allege that these contracts between Orange or Sunkist, on the one hand, and Hyland-Stanford and Mission Dry on the other hand, were entered into as part of the conspiracy, which didn't involve those two companies, but a conspiracy between Sunkist, Orange, Lemon, TreeSweet and Silzle. Then they are saying they are not relying on this as a cause for damage.

We say that this has no business in the case. It is a little bit like what your Honor has referred to in the past as the bad boy statute. This is an effort to drag something in which wasn't alleged to be part of the conspiracy, in the first place, and which isn't claimed to cause any damage; which is simply here to prejudice these defendants in the minds of the jury. It has nothing whatsoever to do with the claims in this case.

It seems to us that the only way we can present this is to say that if these things——

The Court: All right, I see your problem. Let me suggest this: It seems to me that you could first say, start down along about line 14: You are instructed that these contracts are not part of the six acts complained of, and therefore may not be considered by you as any cause of [4208] plaintiffs' damage, if any.

Mr. Fowle: Well, your Honor, we don't need to do that, because your Honor is going to tell the jury that anyway, that it has been stipulated that these are not the basis of any claim for damage.

The Court: If I am going to tell the jury in

these instructions somewhere, you had better get something written out for me, because I won't be able to keep it in my mind.

It is true I propose to tell the jury in an instruction here about what these six acts are, and that the damage has to come from those acts and a violation of the antitrust laws.

If you want to, you could say that in here. Then I think you could say: Unless you find from the preponderance of the evidence that they were entered into as a part of the conspiracy charged, combination or conspiracy charged, you may not consider them as any violation or any part of a violation of the antitrust laws.

Mr. Fowle: That is of some use to us. But if they are a violation of the antitrust laws, that is an additional charge against these defendants, a charge of violating the antitrust laws that was not part of the original complaint.

Again, I say, if they are not going to claim that that damaged them, that that simply is the bad boy statute again.

I would also say if they claim this is an additional [4209] provision of the antitrust laws, it is too late to incorporate it in the complaint.

The Court: My point in putting it that way is this: Every bit of evidence in the case may have some bearing on some issue somewhere, and when you use this broad language "excluded from the case," I think it is error.

We can possibly take it out of particular parts.

You can say you cannot consider it as any part

of damage. No. 2, if it is not part of the conspiracy, then it cannot be considered as part of the antitrust laws.

There is not much that plaintiff can do with it after that.

Mr. Fowle: Except argue to the jury, Look what these people did, they went so far as to foreclose the processing capacity around the State of California from these poor little fellows like Independent Food Processors.

Mr. Dixon: That is the purpose for which it is offered.

The Court: It might have a bearing on the intent involved in this conspiracy. Because everything a man does involves his intent.

Mr. Fowle: Except the conspiracy charged here is a conspiracy to get rid of the plaintiff. How can this have any bearing on getting rid of the plaintiff?

As a matter of fact, as I suggested in the last line of this instruction—and I am perfectly willing to take tne [4210] last four lines out of there, I think perhaps they shouldn't have been there, I did this late at night, but the fact of the matter is that if, as is suggested here, Morgan Ward wasn't able to peddle his oranges around as successfully as usual, he probably had more oranges available than before, and he was the plaintiff's principal source of supply.

I just don't see how this has anything to do with the conspiracy to get rid of the plaintiff.

The Court: I am not going to give all the things in the instructions that you might argue.

You understand, to start with, your right to argue this case is a lot broader than the instructions I give.

Unless you get clear out of line I don't ordinarily stop lawyers from arguing their case and presenting the matter. If you get clear out of line, I might stop somebody. But it seems to me that as to 25-1 as it now stands, I would reject it. That you may take one and add to it, that you can take it out of the case as far as it concerns damaging the plaintiff; you can take it out of the case insofar as a part of the antitrust laws, violation of the antitrust laws is concerned. Even then I think you are going pretty far for plaintiff there.

Mr. Dixon: May I interrupt, your Honor?

This instruction deals with, in many respects, the same type of thing that is covered in the instruction I think your [4211] Honor has already given with reference to any finding or consideration of——

Mr. Fowle: Price fixing. Correct. It is the same type.

Mr. Dixon: And I think it should be, and I have no objection to, and can see no valid objection to patterning this subject matter after the same kind of an instruction, which tells the jury in a few words what they may consider it for, if anything.

Mr. Fowle: We, of course, would like to do that, if that is all we can do. But it seems to us that to let these claimed violations of the antitrust laws, which were not included in the original complaint,

stay in here, and be argued to the jury, while we are told, that, yes, you can have instructions that the plaintiff can't claim damages for these things, simply tends to prejudice the jury against the defendants.

The Court: There is a lot of material in this case put in by both sides which may be argued or may not, which may have some evidentiary value in the case, but certainly is remote. The complaint alleges that these were entered into as a part of the conspiracy, and I think we could hold plaintiff's nose to that, that unless they found that they were part of the conspiracy, then they cannot be considered as a violation of the antitrust laws, as a particular part [4212] of the antitrust laws.

But whenever you take any piece of evidence and say you can read it out of the case, you run afoul of what you always tell a jury, that they must decide the case on all the evidence, not only plaintiff's or defendant's, but all the evidence.

I am going to reject 25-1, and see what you can do with it.

If you think these contracts are that important that you want an instruction on them, all right.

Mr. Williams: I think we have another objection, your Honor, and that is that there is no showing that these contracts had any relation or effect upon interstate commerce.

Morgan Ward was not in the business of processing and selling in interstate commerce. It is only intrastate transactions.

The Court: I would say if you want to raise

that point, the way to raise is, you are also to determine whether or not these contracts had any effect on interstate commerce.

Mr. Fowle: I think your Honor sees our position; even if we eliminate the thing for all those purposes, they are still there to be argued for some purposes.

The Court: I think they can properly be argued for some purpose. I think you have asked too much. You say throw them out completely. [4213]

I think you can whittle it down.

We are going to knock off here pretty quick.

25d. Do defendants submit this as it is?

Mr. Fowle: Yes, your Honor.

Mr. Dixon: Is this in the form that you want it?

Mr. Fowle: I think so.

The Court: All right.

Mr. Dixon: I have numerous objections to it, if it is to be considered.

The Court: What are you trying to point up? You are trying to point up something on the refusal?

Mr. Fowle: Yes. That really is the heart of the matter, on both causes of action. That is the focal point of the whole case, it seems to us.

The Court: No, 1, it is not the refusal alone, it is the refusal against the backdrop of the Tree-Sweet and Silzle contracts. [4214]

Mr. Fowle: Well, that is implicit in this instruction.

The Court: No. 2, a lot of it is argumentative. Some of it would make a pretty good argument to

the jury, as you argue on it. The arguments aren't as precise as instructions. But is not an instruction under what circumstances the jury may disregard this refusal business.

Mr. Fowle: Correct, because it seems to us that the whole case really boils down to the propriety of this refusal to give the plaintiff contracts on arrangements comparable to those that were given to TreeSweet and Silzle.

The Court: Well, of course, you have got, for instance, a "but" down in line 25. "Unless you find it was made without valid business reasons, but was made"——

Now, it might have been made pursuant to one of the conspiracies and might also have been made for a valid reason, and it might have been also an independent decision of Exchange Orange in which other conspirators concurred.

Mr. Williams: If it is an independent decision, it can't be by conspiracy.

The Court: Suppose the decision was made and then concurred in by the other conspirators.

Mr. Williams: Then it wouldn't be independent.

The Court: At the time it was made, it was independent.

Mr. Williams: No. It would be by agreement.

Mr. Fowle: The last part of the instruction takes care [4215] of that, "but was made pursuant to one of the conspiracies."

The Court: Will you briefly state your objection to it?

Mr. Dixon: Well, your Honor, briefly, the first

part of it, of course, seems to me to be clearly improper for obvious reasons. That is the first sentence.

The second sentence purports to state a legal view of the obligation of Exchange Orange which is not in context or in accord with the evidence before the jury in this case, and singles out a particular transaction or contract or contracts, and in effect says that those contracts are legal.

Of course, the next sentence goes on to discuss—those contracts, incidentally, are in dispute as to what they are, whether they are processing contracts or just what they are.

Now, the next sentence goes on and says that they may enter into processing contracts, which I don't agree with.

The Court: We have got an instruction on that.

Mr. Dixon: We have covered all that.

The Court: They can make lawful processing contracts, but they can't make them as a device. We have got that already covered in instructions.

Mr. Dixon: Then it takes up the question of one of the six things that are charged to be part of the conspiracy and purports to give a specific clearance, in a sense a qualified clearance, to that act in language which will certainly require [4216] amplification and clarification, if proper. I don't think it is proper.

In other words, this instruction as a whole seems to me certainly does not fit in with the previous instructions already discussed on the general charge of the six acts.

The Court: All right. That's enough. It seems to me if I was wanting to offer an instruction on this refusal, which is an important part of this case, because it together with what I call the background of TreeSweet and Silzle contracts, comes pretty near being the main thing plaintiff is complaining about, I would start out and merely call attention that one of the six overt acts, the sixth act complained of, was the refusal. Something to call their attention to it.

The trouble with your instructions—you don't mind my being critical? I like you, even if I am critical, and I may be wrong.

Mr. Fowle: I have a thick skin.

The Court: The trouble with your instructions is you are so prolix. You use a whole paragraph to call attention to this refusal. You can do it in a sentence. It is one of the six acts complained of. Then you follow up, No. 1, unless you find this act by itself or in conjunction with some of the other six acts caused damage to the plaintiff, then you may not consider it for that purpose. I think I would have to give that instruction. In other words, it may not be [4217] artfully worded, but it is in there.

It is alleged to be for a certain purpose and unless you find that it is there by a preponderance of the evidence, you can't consider it.

Secondly, if you find it was not a part of the conspiracy or combination or monopolization—I am just thinking out loud—a part doesn't tell the story. I was thinking of some way to make a statement

that could not be considered as a violation of the antitrust laws.

Mr. Dixon: It is very difficult, Judge, to pick it out of context when they are obviously trying to focus attention on one particular act which they regard as more important in the defense of their case.

Mr. Fowle: We are not really focusing attention on one act. The focus is upon three. It is upon the TreeSweet and Silzle contracts and the refusal to give a comparable one to the plaintiff. It seems to me that is quite implicit in this. We say the case really turns upon the propriety of the refusal to give a contract to the plaintiff comparable to these other two contracts. That necessarily involves three of the six acts.

Mr. Dixon: The plaintiff could have gotten oranges from other sources. You are certainly going to argue that. That is just as important in a sense from your point of view, and they are entitled to an instruction on that. [4218]

Mr. Fowle: I think you would argue we are not entitled to an instruction on that.

Mr. Dixon: I might. You are not entitled to this kind of an instruction that you have requested. You get into the question here of pointing up that they might have a perfectly valid business reason for refusing. You might argue that to the jury, but I don't think you can put it in any instruction to highlight it. Motive is no defense in an antitrust case.

Mr. Williams: It is on a refusal to sell. That's the Lorain Journal.

The Court: I think a thing like this, you ought to go back, and I am going to fit these instructions together, you ought to go back to 12, which is a plaintiff's instruction, if you want another sentence in there, and say conversely what you want.

12 says if you find that the effect of the act of Exchange Orange Products in entering into the 1951 contracts with TreeSweet and Silzle and refusing to enter into comparable contracts with the plaintiff whereby it could have secured oranges, and so forth, was to exclude plaintiff as a competitor from a substantial market for single-strength juices sold in interstate commerce, such exclusion would be unreasonable and in and of itself illegal.

Then conversely, if you find by a preponderance of the evidence that such was not the effect of the matters referred [4219] to, and that there was no effect to exclude plaintiff—or put it this way: Conversely, you may find that such was not the effect was not to exclude plaintiff from a substantial market, and in such event such exclusion——

Well, of course, you have got two things there.

And if there was no such exclusion, then such matters were not illegal.

I am not going to be critical, but I will say this, I think by and large Mr. Dixon's instructions came a lot closer to what instructions should be than what you have presented to me, and when you go over these you will find I have accepted a number of his

instructions, many of which are likewise instructions which call attention to your situations, like the one on the lawful processing contract, when it is lawful and when it is unlawful.

As a result, I have had less trouble in going over the form of his instructions than I have had with yours.

Having gone over and been satisfied with a number of plaintiff's instructions, it seems to me that the time to stick yours in on those, if you think there isn't enought conversely on the thing, is right at that time, because when I sort these things out, that is where they are going to go in.

As a matter of fact, you can raise your point a lot easier by looking at what I have given for the plaintiff here, [4220] and you are in a better position then. You know what I am going to say on the plaintiff's instructions, and then your instruction will logically follow.

I don't guarantee to get them in the right order, but I will try to do it.

Mr. Fowle: That would be fine, your Honor, if we agreed with the content of the plaintiff's instructions. I get your point, though.

The Court: That's easy enough now, because I have told you certain ones of the plaintiff I am going to give, so this is a fait accompli, you know, the old Chinese proverb.

In other words, so you won't misunderstand me, I am not trying to knock down every instruction you give, but you give me this one, for instance, 25-B. I have got the middle two sentences marked

that have to go out. They involve some other instructions that I have already given and they are not complete in themselves, unless I want to go back and repeat what I said in the others. At least part, I don't think, is a correct statement of the law.

I am going to reject 25-B. Now you have got the week end to see what you can come up with.

Defendants' 36.

Mr. Dixon: Do you stand on 36?

Mr. Fowle: Yes. 36 is one which is tacked on to the end of one of yours and which comes out of the same case. [4221]

Mr. Dixon: I have no objection, your Honor. I have been waiting to say that for a long time.

The Court: 36-A?

Mr. Dixon: That is a horse of another color.

The Court: Now, what general subject does this cover?

Mr. Dixon: This has to do with the subject of damages.

The Court: Is this one you approve?

Mr. Dixon: No, indeed, your Honor, I do not.

The Court: Do you just object if they are long and agree if they are short?

Mr. Dixon: The trouble is, if they are short and to the point, I can't find anything to object to, but when they are long, I can find plenty.

The Court: All right. Let me read it. I would reject 36-A without hearing from the plaintiff on it on the ground that again this might be a jury argument. There has been evidence given on specu-

lation and conjecture, and if you want to spend time and it is important, you can take the jury along that road. It is an argumentative instruction.

It has in line 7: Since any and all damage to plaintiff is claimed to have resulted from its alleged inability to secure Valencia oranges——

Mr. Fowle: Isn't that true?

Mr. Dixon: That may be one of the proximate causes of the damage. [4222]

The Court: I think it is a very limiting statement.

Mr. Dixon: It covers the whole case.

The Court: It resulted from the evidence the plaintiff put on in this case.

Mr. Dixon: Could we make a case if that is all we alleged?

The Court: It is not a correct statement of the law. Then you say: You have to determine at the outset—you are telling the jury the first thing you have to determine is this. I am not going to tell the jury that.

You might say to the jury, well, first determine whether there are some violations of the antitrust laws, next find whether there was damage and causation, some general principles, but I am not going to pick out one of the particular things and tell the jury they have got to look at this thing first before they look at anything else. I don't propose to give any instruction about speculating on oranges. You can argue it. I am not going to keep you from arguing on things like that.

Mr. Fowle: We would expect to make the argu-

ment, also, but it seems to us this is one of the real basic questions in this entire controversy. If, as the plaintiffs say, there was a duty on the part of Exchange Orange or Sunkist to furnish oranges to Winckler-Smith Company when they asked for them in 1951, how can anyone in the world tell what amount of oranges [4223] should have been made available.

The Court: Let me give you an example of how wrong you are. Supposing you had a personal injury case where a plaintiff has got a bad back. So the defendant comes in and gives an instruction, "At the outset you are going to have to determine and fix the amount of damage that this person suffered from this back. You may not speculate or conjecture on how much this injury is. You must base your decision on some reasonable yardstick about measuring bad backs. If you are unable without conjecturing or speculating on what is a reasonable estimate of how bad his back is, to determine that, then you may not bring in a verdict for the plaintiff and your verdict must be for the defendant."

Do you think a trial judge would give that?

Mr. Fowle: I don't believe the situations are comparable.

The Court: I think it is comparable because if you ever had anything that has that as a matter of common sense is speculative, it is trying to fix the amount a plaintiff is awarded. Of course, what do courts do? They give instructions like I have got in my general instructions. Damages must be rea-

sonable. You may not speculate. You may not give damages for prospective injury which is not within the realm of possibility.

They content themselves with those general statements [4224] of law and don't come out and start to pick up—if a defendant in a personal injury case pulled out an instruction like this on damage, the yardstick in speculating, there would be an awful howl from the plaintiff. With that kind of an instruction given, pinpointing, tearing apart this matter of damages, you would never get a verdict for the plaintiff.

What happens in the argument? The defense lawyer gets up and says, "He has got a bad back. There is nothing in the X-rays. The back is perfectly good. It is all in his mind. It is all subjective. There is no injury here."

Then the plaintiff gets up and says, "Sure, it isn't in the X-rays, but you have had pains, ladies and gentlemen, and you have been to doctors and they have told you there is nothing wrong with you, and yet you know how you have felt."

That is the only way you can handle problems like this. You can't take an instruction like 36-A and proceed to do what you have done.

Do I make a little impression on you?

Mr. Fowle: Yes. I better not go on any further.

The Court: I have already in my form instructions got some very fair instructions to defendants. Damages can't be speculative. You can't use a

pooling plan. Damages must be reasonable, not conjectural.

Sometimes when I read those I feel kind of ashamed of myself for sticking them in. [4225]

Mr. Dixon: There are some that I would prefer not to have in, Judge, but it is all right.

The Court: I will reject 36a.

Mr. Williams: This question of how many oranges should be given the plaintiff——

The Court: I am not going to restrict you on arguing that. This would make a pretty good argument.

Mr. Williams: It also goes to liability, because supposing you were Exchange Orange, and plaintiff comes around to ask for oranges, how do you determine how many you give him?

The Court: That is a good argument. [4226]

* * *

The Court: I can't remember what I have in there.

39. Do you offer it?

Mr. Fowle: Yes, sir.

The Court: The plaintiff?

Mr. Dixon: There are some things in there that I would like to discuss, your Honor.

I assume by "earnings" they mean profits from operations.

It sounds like this was taken from an instruction where somebody was killed or maimed and was claiming loss of earnings. [4227]

No. 2——

Mr. Fowle: There is a claim of loss of earnings in the complaint. That is part of the language.

Mr. Dixon: Don't hold me responsible for the complaint in the first instance, or it would have been different.

The Court: Of course as a matter of fact, earnings is broader than profits. "Profits" narrows the plaintiff.

Why do you pick July 31st?

Mr. Fowle: Because that is the date of a certified financial statement of the plaintiff company showing that it had already up until that time lost $148,000 out of the $184,000, which was lost during the entire year, and because the Valencia season begins at or about that time, and it wasn't until at or about this time, or thereafter, that the defendants would have made any oranges available to the plaintiff in any case.

Mr. Dixon: That isn't quite the evidence for this plaintiff. It starts its operations usually around about the latter part of June or early part of July. Sunkist doesn't. But then there is nothing in this instruction concerning the fact that the claimed loss of earnings here, as far as plaintiff is concerned, that the yardstick is the two-year period following its termination of Chapter XI proceedings. However, of course, you will argue that the whole period was in, I presume. [4228]

The Court: What about this? Can't we say, You may consider the evidence in respect to plaintiff's earnings since the time of its incorporation and whether or not the plaintiff has operated at a

loss during the period of its incorporation until 1951?

Do you object to that?

Mr. Walker: Doesn't that put undue emphasis on loss?

The Court: Loss or profit.

Mr. Dixon: In that connection, since we are dealing with this precise point, we had in mind requesting your Honor's comments with reference to the status of the record as it now stands.

One of the big contentions of the defendant is that the loss they claim resulted here of some two hundred some odd thousand dollars occurred in the fiscal year ending January 30, 1950, that that testimony upon which Mr. Lynch based his statement with reference to that loss, which he attributed to the sale of the plant as having occurred after the reorganization, or the termination of Chapter XI proceedings should be in my judgment removed from the case. Insofar as any evidence that he gave that bore upon his opinion as to that loss, which was based upon that fact, the jury should be instructed to disregard it, because the record in this case now shows clearly, at least in my judgment, that the basis of his whole plan of computing this loss for the period [4229] ending January 30, 1950, was based upon something which was not legally and could not be legally correct.

Therefore, the assumption upon which his figures are based must be taken out of the case and the jury instructed to disregard them in determining whether there was any loss.

The Court: I have got a note of that.

Mr. Fisher: We certainly object to that position.

The Court: I understand you object, and you claim it is a voluntary sale.

Mr. Fisher: Yes.

Mr. Dixon: But it is important to the plaintiff, certainly, because that is the basis under which you get all your figures that they had this terrific loss.

In other words, this instruction—this is the place to put it in on that, since it deals with earnings and contentions made by the plaintiff, as well as the defendants, it might properly be discussed under this kind of instruction by the court.

The Court: I intend to interpret what happened by the Chapter XI. My present intention is to state that the sale of the real property was, as a matter of law, a part of the reorganization.

You don't like that, that may be true, but I am going to do that.

I will have to get something over the week end, or [4230] Monday, and have it for you Monday afternoon. I said "week end"; over Sunday, I guess.

Apart from that, can't we give this instruction like I indicated?

Mr. Dixon: In this form I certainly object to it vehemently, telling the jury that they can't consider anything after July 31, 1951.

The Court: All right. This far: Upon the question of claimed loss of earnings, you may consider the evidence in respect of plaintiff's earnings since the time of its incorporation, and whether the plain-

tiff operated at a profit or loss during the period of its incorporation until 1951.

I reject 39 in the form that it is in. I don't care how you argue it.

Mr. Fisher: Wouldn't it be better to say "until the close of its 1951 fiscal year"?

The Court: It probably would.

Mr. Dixon: You don't want me to be bound to January 30, 1952, do you? You want it to end—I am sorry, I am getting groggy. Your idea is to make the date January 30, 1951? I have no objection to that.

Mr. Fisher: No.

The Court: '52 he means.

Mr. Dixon: No. '51, your Honor, because that is the fiscal year. In other words, we claim profits of $140,000 [4231] were earned——

The Court: Why don't we just do this? "Profit or loss during the period from its incorporation."

Mr. Dixon: All right.

The Court: Your argument is going to be——

Mr. Dixon: That is okay. I would just as soon not have a date.

The Court: I am going to reject 39 as it now stands.

Mr. Fisher: How would it read?

The Court: "Upon the question of claimed earnings, you may consider the evidence in respect to plaintiff's earnings since the time of its incorporation, and whether the plaintiff operated at a profit or loss during the period from its incorporation."

Mr. Fowle: You propose to give it in that form?

The Court: Yes.

Any objection to 40?

Mr. Dixon: Mr. Walker's rights are as trustee.

The Court: Those are the only rights he has got.

I think it is a proper instruction.

Mr. Dixon: That is all right. I have no objection to it.

The Court: Maybe we are getting tired.

41.

By the way, I will try to go through and make everything [4232] "plaintiff" instead of "plaintiffs."

Mr. Dixon: This is certainly objected to, your Honor, even though it is short.

The Court: That is to raise a question of law.

Mr. Fowle: Our position on that instruction is that there was no effort made to show what would have happened to the plaintiff if plaintiff had had a Silzle contract, and that there is no evidence in the record from which the Silzle contract could be considered for the purposes of damages that wouldn't allow the jury to engage in the wildest kind of speculation and conjecture.

The Court: Couldn't the jury go out and take the Silzle contract and proceed to make some computations?

Mr. Fowle: I don't see how they possibly could, without engaging in the wildest kind of speculation.

The Court: Isn't there enough material in the record?

Mr. Fowle: I don't think there is.

Mr. Williams: They don't have the overhead, and all that.

Mr. Dixon: The jury has all the overhead.

Mr. Williams: Only on a 12,000 ton basis.

Mr. Fowle: You have our point.

The Court: I reject it, and I have your point.

Here is 34 revised for what it is worth. This is 34 we are talking about. The first part of it I dictated something [4233] to the girl, and we wanted to see what it looked like. It is much like what you have got, except breaking it down further. Remember your 34, the first part? It is called "revision of 34."

Mr. Fisher: That is plaintiffs' 34?

The Court: No. It is defendants' 34. I will put "defendants" on there.

It is not much different from what you have got. Maybe you don't like it as well.

Mr. Dixon?

Mr. Dixon: I have no objection to it, if you are waiting for me, your Honor.

The Court: Defendant? Without waiving your objections to my refusal to give your 34 as requested?

Mr. Fowle: I think it is all right. I would prefer "the proximate cause," instead of "a proximate cause."

The Court: I hope we can avoid getting into all of that business. [4234]

* * *

Monday, February 6, 1956—2:00 P. M.

(The following proceedings were had in the chambers of the court:)

The Court: If you will first turn to the plaintiff's group of instructions that we have passed over. I went over these instructions Sunday, and I want to call your attention to certain things.

On plaintiffs' 6, and you won't have to look at this, to be consistent with my rulings on public injury, I will strike out of 6 the insert on line 8, "and that public injury has been proven"; and all your record made on public injury, and all your record made in the objection to 6, may be incorporated herewith, and is overruled.

On No. 7, I have redrawn it, and if you are looking at 7, I can tell you what I did, and you can take my word that the redraft does it.

On 7, as it stands corrected, I struck out matters on lines 6, 7, and 8, which didn't add anything to it, in my opinion, and made it more cumbersome. On line 6, after the words "causes of action," the rest of line 6, line 7, and all of line 8, down to the second cause of action, and struck out, also, the reference to public injury.

I did some other things too. On line 11, I changed that around so that it reads, beginning at 10, middle [4239] of 10, "were committed by any one of the defendants or co-conspirators, that you find were a party to such combination or conspiracy," and so forth.

And down on line 13, "combination or conspiracy, period," and struck out the rest of it.

Mr. Dixon: A period at the end of "conspiracy"?

The Court: Yes.

What I struck out there was "and would bind and make liable such defendants," and so forth, to the end.

It doesn't add a thing, and I think I have said it all when I get to the end of "conspiracy" on line 13.

I have now called it Revision No. 1 of Plaintiffs' Instruction No. 7.

Do you object to that change, Mr. Dixon?

Mr. Dixon: I do not, your Honor. It is all right.

The Court: All your record made on public injury in connection with these instructions may be incorporated to Revision No. 1, and your objections heretofore made to Plaintiffs' 7, and the objection is overruled. [4240]

The Court: Then to make it easier for me to shift around here with these instructions, here is what I call now Court's N. This is an instruction which I said I would give when we were discussing Plaintiffs' 13. I have merely put it on another sheet of paper so I can do some shifting.

I think it said "was misused," and I have inserted "was illegally used or misused."

I don't know if there were any objections at the time I said I would give that, but if there were,

they may be incorporated to N and be overruled.

Likewise, what I call the Court's instruction O was another squib that I said I was going to give at the time we discussed Plaintiffs' 32. I merely put it on a separate sheet of paper as the court's instruction, and I will give it.

On Plaintiffs' 19, which I have redrafted, it is largely a matter of getting rid of a lot of the material in it that we had——

Mr. Fowle: I thought that was withdrawn, your Honor.

The Court: 19?

Mr. Williams: My note is 19 is to be given.

The Court: I have at the bottom it is a reference to direct and indirect evidence and should I use, and I told you I was going to give it unless I advised you otherwise. The only thing outside of cleaning up the typing job was I added the last paragraph: [4241]

"However, the plaintiff has the burden of proving such matters by a preponderance of the evidence."

We were talking about evening up instructions, and I got tired of waiting for some of your suggestions, and here is the way I even this one up.

Mr. Fowle: You are speaking of 19?

The Court: 19. I take it you have no objection to the addition of the last paragraph.

Mr. Fowle: No.

The Court: I still have the question of "shall I give it." Unless I advise you otherwise, I am going to give it.

Plaintiffs' 23, here is a copy of revision No. 1 before you. I can tell you quicker than you can look at the note about what I have done, but you will have to make one addition even in revision No. 1 of 23.

On the first line here, it says, "based on all the instructions," so insert after "the" "evidence and instructions."

You will note that all I have done is cut out the language "by activities in restraint of trade," and just the preliminary statement to lead into the question of damages.

Likewise, the last part of the quote in 23, "that principle is an ancient one and is not restricted to proof of damage in antitrust cases," and so forth, I don't think that adds a thing and I have cut it out. That is what I did [4242] with 23.

Mr. Fowle: We would still have the same objection we had before, your Honor, to the use of the word "wrongdoer" in this instruction. Also, we would object to the arrangement of the first sentence. It seems to me the cart is before the horse. If you as jurors determine that the plaintiff's business was injured, and then, secondly, that the defendants or either of them is liable, the question will arise as to plaintiff's damages.

The first thing that has to be determined is whether there is liability.

The Court: It says there, "and that the defendants or either of them is liable." If you get that far, then the question arises as to damage. Objection overruled.

Any objection you had to 23 before the revision will be incorporated.

Mr. Dixon: The only suggestion I have to meet the objection is to add the word "therefor" after the word "liable." That is just a suggestion.

The Court: All right. "Liable therefor."

Mr. Fowle: I would simply state for the record that that doesn't meet our objection.

The Court: Objection overruled.

Now, on instruction 24, I haven't retyped it. Instruction 24, line 11, there is this statement, "These are governing [4243] principles applying to compensatory damages if unliquidated." I don't think it adds a thing, and I am cutting it out.

Mr. Fowle: The entire sentence?

The Court: The entire sentence. Any objection heretofore made to 24 may be incorporated as the objections to 24 as it now stands, and I will give it.

Now, as to 30, I propose to change 30 to make two sentences out of it with the result I will strike the word "while" in the first line, and I will end with a period after "contract" on line 6. Strike out the word "that," and start a new sentence with the words "However such."

This again is a matter of two reverse sides of the coin. I don't think it changes the principle involved, but instead of making it look as if it is all a plaintiff's instruction, it is a defendants', instruction and a plaintiff's instruction.

You may incorporate all the objections to 30 as heretofore made, and they will be overruled. I

will give 30. It doesn't do any violence to your— [4244]

Mr. Dixon: No, we have no objection to that, your Honor.

The Court: All right.

31. 31 is another of these that I said that I would give unless I advised you later. I still have a lot of doubt as to 31, since it is one of these recitation instructions, and I may not give it. But unless I advise you otherwise, it will be given as it stands.

There is one other instruction that I did something to. I think it is 34.

34 is again an instruction in which I am merely changing the form of the words so that in the two halves of it it has both sides of it.

In line 8, after the words "if they cared to do so," period. Strike out "but when," and start a new sentence with "However, if and when."

And on line 12, "must exercise their monopoly power"—insert "if such they possessed."

And on line 14, insert the word "fruit" between "citrus" and "juices."

And the objections you heretofore had to 34 will be incorporated, and they will be overruled and I will give it with those changes. [4245]

* * *

Mr. Fowle: The next one is Defendants' Jury Instruction No. 34-A. and it is a proposed revision of original 34.

The Court: On 34, what did we do—reject it or give part of it?

Mr. Fowle: Actually what happened was you rejected our proposal, it was the instruction that dealt with causation, [4247] and after rejecting our proposed instruction you drafted another one which you said you would give.

The Court: Which was based in part upon your first two or three sentences?

Mr. Fowle: Correct: We weren't altogether satisfied with that.

The Court: This would be in lieu, now of 34——

Mr. Fowle: 34 or any revision of it that has been made up until now, although we do wish to keep our record, of course, on our original proposal.

The Court: It is in lieu of your first 34 as submitted——

Mr. Fowle: Right.

The Court: And you can have all the objections you had to my proposed ruling on your first 34 incorporated herein for what they are worth. But by submitting the revision, are you, in substance, withdrawing your request for 34 as first submitted?

Mr. Fowle: No, sir.

The Court: You want that to stand?

Mr. Fowle: We think we are entitled to it. [4248]

The Court: All right. It may stand. This is also in lieu of what wound up as 34.

Mr. Fowle: It is in lieu of an instruction that is headed revision of No. 34.

The Court: Revision No. 1, wasn't it? [4249]

* * *

Mr. Williams: Didn't we decide at the last session since monopolization was just the result of combination or conspiracy in this type of charge, that we included monopolization by referring to the acts pursuant to the combination or conspiracy?

The Court: Well, not necessarily. Technically, on the record of the case, I think the plaintiff could contend apart from the conspiracy, one or the other of the two defendants monopolized. It would have to be EOP monopolized. But I commented somebody might propose an instruction, if there was monopolization, I think we are agreed on the law, it could only result from the acts of several people in a conspiracy or the act of a single person apart from the conspiracy.

Mr. Fowle: Our understanding was there was no charge any individual single defendant had monopolized.

The Court: Well, I don't know. Is there?

Mr. Dixon: Well, the language of the complaint is, combination and/or conspiracy to monopolize and monopolization of the citrus fruit juices.

Now, your question is whether plaintiff contends that any single individual monopolized, I mean any single individual defendant, is that the question?

Mr. Fowle: Yes.

The Court: That is the question. I don't think, leaving [4252] out your alleged monopoly of product fruit, that you could possibly charge—the only thing you could possibly charge would be that EOP monopolized the fruit juice market.

Mr. Dixon: That's right.

The Court: Now, the question is, do you want that left in the case?

Mr. Dixon: Well, our contention, of course, is in the sense Mr. Williams has suggested, that the effect of their acts has been to give them monopoly over the citrus juices, particularly single-strength Valencia juice.

Mr. Fowle: As I have understood the charge under Section 2 of the Sherman Act, it is a charge that there was a conspiracy to monopolize, with the additional charge that not only was there a conspiracy to monopolize, but the conspiracy was successful.

Mr. Dixon: Well, that it was effective, yes. That is the substance of it. Now, of course, the question goes to whether or not when you—certainly standing alone I would unhesitatingly say in the broad sense of the term that EOP did not have monopoly of the single-strength juice, because it doesn't add up in percentages.

The Court: Well, all right then.

Mr. Dixon: But collectively it does, in my judgment. [4253]

* * *

The Court: I will give it, but, query as to the instruction on causation.

What is the next one?

Now, by giving it, you now want 34 withdrawn?

Mr. Fowle: No, we don't want it withdrawn. You mean the one you drafted with your secretary?

The Court: Yes. This supplants that, doesn't it?

Mr. Fowle: Yes, but this doesn't supplant our original 34.

The Court: No, it doesn't supplant any of your original objections, but I would now pull 34 out.

Mr. Fowle: Correct.

The Court: All right.

Now, what is your next one?

Mr. Fowle: This one.

The Court: This is just to raise a legal point?

Mr. Fowle: This, it is proposed, would follow plaintiffs' Instruction No. 33, which deals with the subject of monopoly, monopoly power, and so on. We propose that at that point the jury be instructed that the mere fact that Sunkist has 65 per cent of the products oranges is not enough all by itself on which they could base a finding of monopoly power over products oranges.

The Court: You are talking now about monopoly power [4270] over products oranges?

Mr. Fowle: Right.

The Court: Does the plaintiff object?

Mr. Dixon: Definitely it does, your Honor. This certainly is not the law in my judgment. This is tantamount to an instruction that the jury must find that on 65 per cent of the products Valencia oranges, that that is not enough for them to exercise power over price and other factors.

The Court: That is the matter as it stands.

Mr. Dixon: That certainly is not the law.

Mr. Williams: Your Honor, we rely on the decision of Judge Learned Hand in the Aluminum

Company case in the Second Circuit, which says 90 per cent may be enough to establish monopoly.

Mr. Dixon: 33 per cent may be enough.

Mr. Williams: He said 60 to 64 per cent is doubtful, which indicates you have to have something more than 65 per cent.

The Court: You make your record, if you want to. I will reject 43. That largely speaks for itself.

Mr. Fowle: It does speak for itself. I don't think there is any need to say more.

The Court: All right. What is the next one you have?

Mr. Fowle: The next one is 44, which is intended to deal with the question of refusal which your Honor mentioned. [4271] It follows Plaintiffs' No. 12 and to a considerable extent uses the language of that instruction.

The Court: I am cutting out "companies" here again.

Mr. Dixon: There is nothing like this in Plaintiffs' 12, counsel, that I can see.

Mr. Fowle: It is not a duplicate of your 12. When I said language of this proposed 44 was taken from Plaintiffs' 12, what I meant is the phrase, "the action of Exchange Orange in entering into the 1951 contracts with TreeSweet and Silzle and refusing to enter into comparable contracts with the plaintiff" is the exact language that you find in the first sentence of Plaintiffs' Jury Instruction No. 12. That is why I used it. It seemed to me it was adequate for the preparation of the

proposed defendants' instruction, and I find it in Plaintiffs' Jury Instruction 12.

Your Honor suggested the other day that we might take Plaintiffs' Jury Instruction 12 and add to it, "conversely, if you find so and so."

The Court: Well, I had the same problem you did. When I read it over again on Sunday, I figured it was a hard thing to do.

Mr. Fowle: It is impossible for us to do that, because we find Plaintiffs' Jury Instruction 12 to be about the most objectionable of all the instructions that were submitted by them from our point of view, because it says the effect [4272] of this act I have referred to here, if it was an effect, if the exclusion of the plaintiff was the effect of this action, then the exclusion is unreasonable per se.

We take the point that is not a proper instruction in our case. I think we have made our record on it. It doesn't make any difference whether it was the effect or not. It has to be either the necessary and direct effect or it must be the effect that was specifically intended.

The Court: Do you have other proposed instructions on this refusal, or is this the one?

Mr. Fowle: This is the one.

The Court: What is plaintiff's objection to 44?

Mr. Dixon: Well, the last sentence is the primary objection to start with. I have no objection to anything which will tie this in with part of the conspiracy, but this is an instruction on the law,

the last sentence. It takes away the matter from the jury completely.

The Court: I have thought this over a long time. Whether I can use this or not, I don't know. But after all, unless this refusal which, of course, has to be considered with other facts in the case, was two things, and they have got them both here, was not the result of independent business judgment, and was not part of the conspiracy or done pursuant to the conspiracy, then I think you are out. I think you have got to sustain that burden. [4273]

I was going to propose something maybe not after 12, but somewhere in here where you talk about refusal, without a lot of this preliminary discussion: If, on the other hand, the refusal of Exchange Orange to enter into comparable contracts with the plaintiff, if such you find, was the result of independent business judgment and was not a part of or done pursuant to the conspiracy charged, then——

I wasn't going to go as far as you have gone here.

Then you may not consider it as any basis of plaintiff's case.

Mr. Fowle: Well, that comes pretty close to some of the things I suggested in some of our other instructions, which didn't meet with approval here. It does seem to me, however, that what you said a moment ago is correct, that if the jury should find that the refusal to give comparable contracts was done as the independent act of Exchange Orange and was not done as part of or pursuant

to the conspiracy charged in this case, that that is the end of the lawsuit, you can forget about the rest of the acts involved here.

Mr. Dixon: I don't agree with that at all, your Honor.

Mr. Fowle: Just forget about them.

Mr. Dixon: If there is going to be any question about it, I would prefer to withdraw this instruction.

The Court: Withdrawing 12 doesn't still answer the question, because in view of the instructions we have got in here [4274] on your side on the refusal, they are entitled to some comparable instruction. Very frankly, they have asked for a bunch of instructions which I think were properly rejected because they weren't the law.

One thing I noticed in going over these instructions and the changes I made, many of Mr. Dixon's instructions had the converse situation in them. To dress them up a little bit I made two sentences out of what plaintiff put in those instructions.

A lot of these instructions you have offered to me in fairness, in trying to show the problem, didn't do it. Looking through what I have rejected, it looks like I have thrown out all of defendants' instructions and have taken the plaintiff's. But I will say frankly, I think the plaintiff's instructions were a lot better.

But I read this over and there were converse instructions in here. You can destroy oranges. You can have 100 per cent monopoly. But you cannot do this.

But there is no converse instruction on refusal. Refusal is a very essential part of the case.

Mr. Dixon: Well, it is, but it isn't enough to throw the case out, Judge, because it is the control of the defendants over the orange supply, No. 1, which enables them to establish a price, No. 2, pursuant to which the plaintiff was unable to get any oranges from any source, including the [4275] defendant. The refusal was part of the conspiracy.

The purpose of this instruction is solely on the law, as to what constitutes an unreasonable restraint per se. That is the sole and only purpose of it.

Maybe the reference here in this should be limited without application to the facts of this case and let the jury decide whether it is applicable. But certainly exclusion from the market here, your Honor, is one of the elements in this case, because if this plaintiff wasn't excluded from the market through the inability to acquire oranges for processing into single-strength juice on a basis that would have enabled him to compete, then there is no violation of the law here.

I would be agreeable, in view of your Honor's comment, to limit such an instruction to a mere statement of what I regard as being the law set forth in these cases, without necessarily applying it to any refusal or anything else. Maybe that is what should be done in view of your Honor's comments. [4276]

Mr. Fowler: We——

Mr. Dixon: You will notice that this instruction stops my merely telling the jury that that would

be unreasonable per se, and that they have to find that there was such an exclusion. It doesn't tell them that if they find that these things were done, and it was illegal per se, that they must proceed to find for the plaintiff, or anything else.

Now, that was the purpose of instruction 12.

So I would be content, in view of your Honor's view on the subject, to either withdraw it entirely, or to just couple it with a statement that the exclusion of a competitor from a substantial market of products sold in interstate commerce is unreasonable per se, and let it go at that.

Mr. Fowle: If I may say this. We don't really care much what the plaintiff does with its own instruction No. 12, We propose this No. 44, in any event. We simply suggested that it follow Plaintiff's 12, because that looked like a pretty good place to insert it. However, the plaintiff has suggested not one, but I would say three or four, maybe five instructions, all of which deal with this question of the giving of contracts to TreeSweet and Silzle, and the withholding of a comparable contract from the plaintiff.

In our view, that is really the nub of the matter anyway.

We think if that happened as a result of a decision on [4277] the part of Exchange Orange alone, and was not part of the conspiracy charged in this case, that that is the end of the ball game.

We can't help it if things turn out that way.

This is a conspiracy case, and we have a right, it seems to me, to have the jury decide whether

some of the things that are charged to be part of the conspiracy are or are not part of the conspiracy.

Mr. Dixon: That I certainly agree with, counsel, but what you are asking in your second line of the requested instruction is to limit this case entirely to what you have put in one sentence and say to the jury, if you find that this was not done, you must find for the defendants.

If there ever was an instruction in my judgment that was not applicable to evidence and to the issues of this case, this is one of them.

Mr. Fowle: I think that last sentence——

Mr. Dixon: It would be highly prejudicial, because you are telling the jury that they must return a verdict for the defendants——

The Court: Let me ask this. Again this is limited to conspiracy. Did we cross that bridge as to whether you would or could contend that there was monopolization entirely by the activities of EOP?

Mr. Dixon: No, I don't think we did, your Honor. But, [4278] as I indicated some time ago, we don't contend here that EOP in and of itself monopolized the single strength Valencia market. Because that would mean that they would have to have produced a sufficient amount and controlled a sufficient amount of the single strength Valencia juice to constitute a monopoly, if we charge that they were successful in accomplishing it. And that would constitute an attempt to monopolize, rather than the actual monopolization of it.

In a sense it is immaterial under the Section 2 charge whether the defendant or defendants achieved monopoly control over the single-strength Valencia juice market.

That doesn't mean that they are being charged with an attempt to do it. The charge is that they combined and conspired to do it. And the complaint further states "and monopolized."

Now, that is an integral part of the combination and conspiracy charged, on the theory that they did effect what they set out to effect, therefore they conspired to do it, because of the acts which preceded it.

But this instruction, or anything comparable to it, amounts to a dismemberment of the claims made in the complaint by isolating them, and is tantamount to saying that you can disregard the other five allegations.

The Court: There ought to be some way to do it. Let me see what I have got here. [4279]

Mr. Dixon: The first sentence I have no—I think it is surplusage. I don't think it is a proper subject for a charge, but when you take the first and second together——

The Court: Try this for size. It will come along in here somewhere. Since defendants say that 12 is one that causes them great concern, I may convert it into just merely a statement of law, instead of "If you find." I don't know. That will take a little work. But try this for size, here:

"However, Exchange Orange would have had a legal right to refuse a contract to plaintiff com-

parable to the TreeSweet and Silzle contracts, if such refusal was no part of the violation of the antitrust laws as charged by plaintiff."

Mr. Fowle: To our way of thinking, your Honor, that really doesn't tell the jury what we are trying to tell them, and what we think they should be told.

The Court: It doesn't tell them, true, but again it is this business of picking out a thing in isolation, and although you contend that this is the case, I am not so sure. Certainly it is a major part of it. But this again tells them that they had a legal right to refuse a contract, if such refusal was no part of the violation of the antitrust laws as charged by plaintiff. It puts it generally.

Mr. Fowle: It seems to me that that really doesn't say anything at all, because it seems to me—— [4280]

The Court: It says a good bit.

Mr. Fowle: ——you can say that anything that the defendants did here, they had a perfect legal right to do, if it wasn't a violation of the law.

The Court: The difference between the matters is this business of chopping it up and taking this little piece and saying this couldn't be, and this couldn't be, and then arguing collectively that none of it could be since each piece couldn't be.

Mr. Fowle: A number of the plaintiffs' instructions do just this, they take the element, refusal to give a contract to the plaintiff, and the giving of the contracts to TreeSweet and Silzle, and single those three out and, as a matter of fact, I wouldn't say

that is improper, because that is the heart of the matter.

The Court: What do you say to what I read? You are not going to like anything on refusal, but what do you say to this?

Mr. Dixon: I think I have expressed my views, Judge.

The Court: Well, express it on this one. Do you want me to read it again?

Mr. Dixon: I took notes here. Are you leaving the second sentence in?

The Court: I am proposing to reject 44 and give this instead. "However, Exchange Orange would have had a legal [4281] right to refuse a contract to plaintiff comparable to the TreeSweet and Silzle contracts, if such refusal was no part of the violation of the antitrust laws as charged by plaintiff."

Mr. Dixon: You would add that to——

The Court: I wouldn't add it to anything. I would run it in somewhere, where there was some reference to refusal.

Mr. Fisher: Would that, then, take the place of 12 and 44?

The Court: No. 12 is on a different point. But if I reject 44, it is what I would give in lieu of it. That puts it in the perspective that I think it ought to be in the whole case.

Mr. Fowle: If you don't mind my saying so, it seems to me that that really doesn't say anything at all, because the jury has got the job of determining whether this refusal was a part of the vio-

lations of the antitrust laws charged by the plaintiff.

The Court: That is right.

Mr. Fowle: And to tell the jury that EOP would have had a legal right to refuse the contract to plaintiff comparable to the TreeSweet and Silzle contracts, if it was no part of the antitrust law violation, it seems to me is not to tell them anything.

The Court: It is in general terms, but by the same [4282] token if it is a part of the antitrust law violation, then there was no right to refuse. It is in very general terms.

Mr. Fowle: The violation of the antitrust laws as charged here is the conspiracy.

The Court: And monopolization.

Mr. Fowle: I think Mr. Dixon agrees that Exchange Orange could not under the charges set forth in this complaint be found guilty of anything.

The Court: This proposal that I am talking about, I am going to call the court's P.

What do you say to this proposal, Mr. Dixon?

Mr. Dixon: I was just mulling it over. It is a hard question to answer, Judge, offhand. The thing that bothers me is——

The Court: It answers the objection that you have made to keep from cutting each of these up and looking at them in isolation. It makes you look at it in respect to the whole case.

Mr. Dixon: It tells them indirectly or inferentially, as I read it, that this refusal to make a contract is perfectly proper, that is the inference, unless it is made pursuant to or made part of the

combination or conspiracy to restrain and monopolize.

The Court: I think that would be better that way.

Mr. Dixon: I am not sure that it would be.

The Court: Logically it follows.

Mr. Dixon: It has got to be placed in perspective with the TreeSweet contract, which the plaintiff, of course, contends throughout this case is discriminatory.

The Court: That puts it in perspective. I will modify the wording of it. I will say "as charged by the plaintiff," and that is the issue. You are past the period of charge.

Mr. Dixon: It infers that the TreeSweet contract is all right.

What I am thinking about, your Honor, is this: Mr. Finley said in no uncertain terms, "I wouldn't give this contract to anybody except TreeSweet."

The Court: Here is the way I propose to word it. I put the word "however" in parentheses, depending on how I fit it in. The text might require it and might not.

"Exchange Orange would have had a legal right to refuse a contract to plaintiff comparable to TreeSweet and Silzle contracts, unless such refusal was a part of a violation of the antitrust laws."

Now, that puts it in perspective against the whole case.

Mr. Fowle: May I make one suggestion before you reject our proposal completely?

Supposing that we changed the last sentence to

read this way: "If you find that such action of Exchange Orange [4284] was the independent decision of Exchange Orange and was not engaged in pursuant to such conspiracy, you may not consider such action as a basis for"—I was thinking of "awarding damages"—"you may not find that such action was a violation of the antitrust laws."

The Court: What do you say to that?

Mr. Dixon: I was off on 12 comparing this with 12, your Honor, again. I apologize. What is the suggestion? Are we back now on Defendants' 44?

Mr. Fowle: Correct.

Mr. Dixon: Not your Honor's suggestion?

The Court: No. They are talking about 44.

Mr. Dixon: What was your suggestion?

The Court: To strike out "your verdict should be for the defendants," and to place, instead——

Mr. Fowle: "You may not find that such action was a violation of the antitrust laws."

Mr. Dixon: I don't agree with that.

It emphasizes again——

The Court: We have got to pass on.

I am going to reject 44, and overrule the defendants' objections, and give the court's P and overrule the objections of both the defendants and plaintiff.

Mr. Fowle: May the record show that we have proposed 44 as originally proposed and with the alternative which I [4285] mentioned a moment ago, so that I have proposed it both ways?

The Court: Yes. And your offer of it is denied and your objection is overruled.

Do you object to the court's P, too?

Mr. Fowle: Yes, sir, for reasons which I expressed, I believe.

The Court: All right. I will give the court's P. What is your next one? [4286]

Mr. Fowle: Well, that is really all that we have put together in the form of proposed instructions, but we had discussed the other day the question of getting from the cases proper definitions of the term monopoly.

The Court: Yes.

Mr. Fowle: Mr. Williams has produced what we regard as satisfactory definitions or qualifications of the instruction that have already been considered. It is not in the form of a proposed instruction, but the language as set forth on defendants' 45 is quite readily susceptible of being put in the form of an instruction.

I might say, also, your Honor, that particularly the first portion of this quote from the Interborough News Company case points up the matter which we discussed Saturday.

The Court: Yes. I read it at the time I studied the case. I don't know whether Sugarman has support in other cases or not for that. He cites some cases.

Mr. Dixon: Do you want my comment, your Honor?

The Court: Yes, sir.

Mr. Dixon: The first sentence is certainly out, it seems to me. The second sentence on page 298 is a fair general statement.

The quotation on 299 is certainly not a statement

of my judgment of the law as it might be applied, because it doesn't deal with what we have here, the conspiracy to [4287] monopolize, and it is objectionable because of its narrowness and because of what it does not include, rather than what it states in part.

The Court: I was impressed with a couple that I read out of Words and Phrases. Did you look those over, Mr. Williams?

Mr. Williams: No, I did not.

The Court: Did any of you look at Glass Company vs. Twin Cities Pipe?

"Monopolization that is condemned is the condition produced by agreements or by acts of individuals so that power may exist to control prices or exclude competition."

Mr. Fowle: Well, your Honor, that is the heart of the instruction we proposed the other day. In order to find that Exchange Orange or Sunkist have a monopoly of product oranges, or anything else for that matter, it is necessary to find that there is the power to exclude competition by others and to determine the price at which others sell. That really is just about what is in that case you just read. The matter we are submitting in Defendants' 45 points up the requirement that there be an exclusion of competition generally rather than exclusion of the competition of a single competitor. As a matter of fact, Plaintiffs' instruction 33 says, I think it says, that the two most important ingredients [4288] of monopoly are power to exclude competition and power to fix or determine price.

Whereupon we turned around and submitted an instruction which said in effect, unless the jury finds we did have that power or those two powers, there should be no finding we have a monopoly on products oranges, and that instruction was not acceptable.

The Court: Well, you object to 45?

Mr. Dixon: Yes, your Honor, I do definitely. There is no number on it.

The Court: It is 45. 45 is rejected. [4289]

* * *

The Court: I also had some humble thoughts here which [4291] I suppose both sides will object to. All you have to say is you do.

First, the court's B. By the way, I never submitted any A to you. You may have wondered where A was, but I never submitted any.

Do you have B before you?

Mr. Dixon: Yes.

The Court: I have made a number of changes on it. I don't know how many you have got in there. Are your copies chopped up?

Mr. Williams: No.

The Court: Let me read you what I have got. Then if you want it worded differently, we can talk about it.

"In a civil damage suit under the antitrust laws, the plaintiff must go farther than to merely rely on proof of violation of antitrust laws. The plaintiff must allege and prove that the particular acts or conduct or happenings which it is claimed caused the damage.

"Here the plaintiff particularly complains of six matters which will be referred to in these instructions as the acts alleged by the plaintiff. They are:

"1. The alleged oral contract between Exchange Orange and Exchange Lemon under which it is alleged [4292] that Exchange Lemon processed oranges for Exchange Orange during the 1951 processing season."

I have just brought that in line so they will be the same.

"2. The alleged oral contract between Exchange Orange and Exchange Lemon in which it is alleged Exchange Orange processed lemons for Exchange Lemon during the 1951 processing season.

"3. The allegation that Sunkist and Exchange Orange Products agreed to establish and maintain the price to independent processors like the plaintiff for product oranges.

"4. The contract between Exchange Orange and TreeSweet in 1951.

"5. The contract between Exchange Orange and Silzle in 1951.

"6. The allegation that Exchange Orange refused to give plaintiff upon request a similar contract." Then I would insert:

"It is also alleged by plaintiff that the contracts referred to above were performed and carried out.

"The other contracts entered into evidence between Exchange Orange, Hyland-Stanford, Mission Dry, and General Foods, also referred to as Birley's, [4293] were offered and received for the purpose of showing the operations of Exchange Orange,

and such bearing as they may have in general, but are not claimed or alleged by the plaintiff to be the cause of their claimed damage."

Mr. Dixon: We put in there, Judge, the other contracts, too.

The Court: What were they now? Just the three of them.

Mr. Dixon: There were two or three others that were mentioned.

Mr. Williams: Harts, is that the one you are thinking of?

Mr. Dixon: Harts. And there was one with——

Mr. Williams: There was the frozen in 1950. I think that's all. Isn't it?

Mr. Fowle: I don't know.

Mr. Williams: There was the frozen ELP ran for EOP.

Mr. Dixon: Well, that is in here, isn't it?

Mr. Williams: Possibly.

The Court: Will you take too much offense at this?

Mr. Fowle: I would say this, your Honor, that the way you propose to state it is almost satisfactory to us. I think in the first paragraph there ought to be some sort of link-up between the acts which are said to have caused the damage and the violation of the antitrust laws. [4294]

Also, we would object, I think, to any reference to these other contracts in an instruction. It seems to us that that is simply calling attention to evidence. If your Honor is to call attention to evi-

dence, there is probably other evidence in the case that we would wish to have attention called to.

The Court: Well, this is calling attention to a limitation of evidence. That is all it is doing.

Mr. Fowle: The principal purpose of this instruction, I take it, is to tell the jury what the six acts are.

The Court: That's right.

Mr. Fowle: And that these are the acts upon which the plaintiffs rely. It doesn't seem to me it helps any to refer to these other acts. [4295]

The Court: Well, it could be in a separate instruction. I coupled it in because these are not on ones on which they rely, and they were not admitted for that purpose.

What is the plaintiff's view on this?

Mr. Dixon: My own thought offhand is, on 3, it isn't quite complete. It takes off part of it. "Maintain the price to independent processors of product oranges"——

The Court: You can say "in summary." I tried to boil them down.

Mr. Dixon: In other words, the maintenance of a price alone would not necessarily damage the plaintiff.

"C" of the allegation, which is your 3, of course you read it and know what it is, but that charges the establishing and maintenance of a price at the level which made it impossible for independent processors, such as the plaintiff, to purchase or acquire by-product oranges from EOP or any other source.

You see, "any other source" there is equally as important in 3 as just to establish the price, which standing alone they have the right to do.

The Court: What would you add to it?

Mr. Dixon: The only suggestion that I can make, your Honor, is to include the language of C there of the complaint, to such extent as you care to do so. Because C is an important allegation, much more so than 1 and 2. [4296]

The Court: What page is that on in the complaint?

Mr. Dixon: Page 11 of the second amended complaint.

My only comment, your Honor, is the brevity of it, rather than the content.

I know it is lengthy, but I don't think I could state it any better than it is in the complaint.

I know your Honor doesn't want to read the allegations of the complaint to the jury. I assume there would be no objection in the argument to probably use them, which would amplify what you have here.

The Court: "To establish and maintain the price to independent processors like the plaintiff of product oranges, which made it impossible for independent processors, such as plaintiff, to acquire product oranges from Exchange Orange, or any other source, at a price or under arrangements enabling plaintiff, or other independent processors, to compete with defendants and TreeSweet and Silzle."

Mr. Williams: It seems to me the "which" in

there leads to a conclusion. Couldn't it be changed in there so it wouldn't do that?

Mr. Dixon: Also competitive to Sunkist, your Honor.

The Court: I say, "to compete with defendants and TreeSweet and Silzle."

Mr. Dixon: I am sorry.

The Court: I don't know what I am going to do without [4297] a secretary.

Your "which" is over here?

Mr. Williams: It starts——

The Court: I took it from the allegation.

Mr. Williams: "And to maintain the price."

Would that fit it? If the "which" is in there now, it implies it did have this result, and it is just the allegation.

The Court: That is right, this is merely an allegation.

Mr. Williams: The "which" seems to take it out of the allegation class.

If you said, "and to maintain," instead of "which."

The Court: I want to make it clear this is an allegation. That the price made it impossible, and so forth.

Mr. Williams: That does it.

Mr. Fowle: If this is introduced by a statement that these are the allegations in the complaint with respect to these six acts, it will——

The Court: I am going to say that. And I am going to say that when I get through.

Mr. Dixon: You see, your Honor, there are so

many of these—the substance of these allegations, if some part of it is taken out, I mean the factual part——

The Court: Haven't I got enough to satisfy you now?

Mr. Dixon: On "C" I think it is true. [4298]

Mr. Fowle: There is one place where there is a mistake, Judge. I think you talk about obtaining oranges from Exchange Orange. I think it should be Sunkist.

The Court: That is what the complaint says, from EOP or any other source.

Mr. Fowle: I don't think that is what is meant.

Mr. Dixon: It is important, Judge, from the point of view of the plaintiff, because here you have Sunkist, which only sold oranges.

The Court: What is important?

Mr. Dixon: You have got all the allegations of "C," I think, in your statement there. If any part of it is left out, in a sense it doesn't state the contention of the plaintiff with reference to it.

The Court: You can read, at least once, your allegation as to these acts.

Mr. Dixon: That is all I want to do.

The Court: But I am not going to give them all. Of course I could read this long section of the complaint with these acts.

Mr. Dixon: The only ones that I am particularly interested in, your Honor, are, of course, C, D and E, and, of course, F. I will be glad to do it, and I intend to say something about it anyhow in my opening argument.

The Court: You do it. Because this in summa would [4299] tell—you have got to pinpoint th so they have some idea what the 6 are. They the contracts, this maintenanc~~e of price~~, and t refusal. I am telling them it is only in summa form.

Mr. Fowle: It seems to me that the argum will pretty well tell the jury what these six a are. If you just refer to them with almost just reference, it will be known what you are talki about.

The Court: I will give Court's B. I take it th is no objection to it?

Mr. Fisher: Your Honor, would that be p posed to be given with reference to the Hyla Stanford contract, and so forth?

The Court: Yes, I am going to put that in, t

Mr. Fisher: It occurs to me that you have m tioned the two——

The Court: I have got Hyland Stanford, Hart Case-Swayne, Mission Dry and General Foods.

Mr. Fisher: It would be preferable to just s "any other contracts," without naming them.

The Court: What harm does it do, Mr. Fishe You are as interested in this as the plaintiffs. Y certainly don't want the jury to go out and figu that these contracts are causes of damage. So juror might get the idea that damage is shown rig over here, but nowhere else. I am just going [430 to tell them the facts of life, that these are n pleaded as acts causing damage.

I will overrule your objection on that. [4301]

* * *

D. I don't know whether you have it in there, but after the word "Winckler" insert "concerning complaints."

On line 6, after the words "falsity of the"—then insert the word "alleged."

Mr. Fowle: On court's D, we, of course, would have the same objections that were urged with respect to the admissibility of these letters during the trial. That is to say, we contend that these letters could be——

The Court: You may incorporate here the record made at the time of trial when the letters were offered, and the purposes you then stated that you offered them for, and my rulings on your offers.

Mr. Fowle: Especially the ruling that these letters would violate the hearsay rule, if considered for purposes other than impeachment.

The Court: All right.

Mr. Fowle: Also, we object to the giving of this instruction, because we feel that it places undue emphasis on the matter. Your Honor instructed the jury quite fully on this at the time.

We have this further objection: that in this instruction no distinction is made between complaint letters, on the [4302] one hand, and correspondence back and forth between brokers and the plaintiff, which may have contained admissions, on the other hand.

The Court: If I give the instruction, I should,

in fairness, add to it, "letters offered in evidence which were written by the plaintiff or its agents were received in evidence on the theory of admissions against interest," and so forth.

Mr. Fowle: That might even include letters from brokers.

I have forgotten whether there were instances of this, letters from brokers which were answered by the plaintiff, might make up a series of correspondence which contained an admission.

The Court: I concede we can think of a situation like that, but I don't think it is in this record. For instance, a broker makes a complaint and the answer comes in, "Referring to your letter of so-and-so, we admit your complaint was justified," then you would have to require both letters. But I don't think there are any letters like that.

I think in each instance if there is an admission he repeated the substance of what was said in the letter.

What is the plaintiff's suggestion to this? Maybe plaintiff doesn't want it, either.

Mr. Dixon: Your Honor has already instructed them on [4303] part of this.

The Court: Now, wait.

Mr. Dixon: Are you talking about D now?

The Court: Yes. Do you want it or don't you? If you don't want it, we are talking about idle matters here.

Mr. Dixon: Yes, I think we would want this.

The Court: Do you want it with this addition, "letters written by the plaintiff or its agents and

so-called anagrams were admitted for the purpose of showing admissions against interest, if any"?

If it goes in, they both ought to go in.

If you want to think about it, all right.

Mr. Fowle: I didn't get all that.

The Court: "Letters written by the plaintiff or its agents and so-called anagrams were admitted for the purpose of showing admissions against interest, if any."

Do you want to leave it up in the air?

Mr. Dixon: No. I think it is all right as far as the plaintiff is concerned.

The Court: All right. I will give it.

E.

Mr. Dixon: E is all right as far as plaintiff is concerned. [4304]

The Court: I have added something you probably don't have on there. Did you have an insert after the first paragraph?

Mr. Fowle: No, sir.

The Court: "And may consider it also on the question of causation, that is, did the defendants cause plaintiff damage."

Mr. Dixon: After the word——

The Court: "And may consider it also on the question of causation, that is, did the defendants cause plaintiff damage."

Mr. Dixon: That's all right with the plaintiff, if you are waiting for the plaintiff.

Mr. Fowle: We have a number of objections to this, your Honor. It may take a moment to state them all. In the first place, we object to this as

being an instruction which, to use a colloquial phrase, is too pinpointed. It focuses the attention of the jury on one relatively small part of the entire case.

The Court: All right. What is your next objection?

Mr. Fowle: Well, looking at the very first sentence, "Testimony has been introduced by the defendants purporting to show a recovery of oil."

The Court: Strike that out.

Mr. Fowle: We didn't introduce the testimony in the first instance. [4305]

The Court: Strike it out.

Mr. Dixon: Where is that?

The Court: The very first line.

Mr. Fowle: Also, the very phrase, "purporting to show," seems to me to be objectionable. The evidence introduced by the plaintiff itself shows that beyond any shadow of a doubt. It is not even in dispute.

Mr. Dixon: We don't think it is a particularly material issue in the case, your Honor, in any way, but we have no objection to the instruction. If counsel don't want it, leave it out.

The Court: I don't want to stick my neck out on these things. If plaintiff says they don't want it, all you have to do is whisper. I have instructed the jury on how they could consider some of these matters. I think it has been covered in my instructions as we went along, and if one of you get out of line on argument on this matter, I may stop you. You will have considerable latitude in argument,

but I am not going to let you argue after-discovered facts. Of course, as a matter of fact, you do have in the record contentions about the Citromat and the oil content in juice, which goes to efficient operation, and you may have other things along that line. Maybe we can save time by knocking it out.

Mr. Fowle: As far as we are concerned we can save a [4306] great deal of time, because, as I say, we have a number of objections to the way this is phrased, the wording of it, the purpose for which the evidence may be used.

Mr. Dixon: Let's leave it in as far as the plaintiff is concerned.

The Court: Then suppose I cut it down and just give the last paragraph.

Mr. Dixon: We will object as to the third paragraph, your Honor, as pinpointing something we think has already been covered in a sense by your instructions. I may be wrong.

The Court: It is covered by instructions given during the trial, not covered by anything else in my instructions now. If you have any doubt about it, I will take it out, because the defendants indicate they have a lot of objections.

Mr. Dixon: What about the third paragraph, your Honor? Did I understand you to say you would give the third paragraph?

The Court: I would cut out a lot of argument if we just cut it down to the third paragraph.

Mr. Dixon: That is agreeable.

Mr. Fowle: Even the third paragraph, we would have an objection there, I think.

The Court: On what ground? [4307]

Mr. Fowle: Well, certainly the refusal of EOP to give a contract would have to be based, it seems to me, upon the general economic conditions in the industry. There is no reference to that element here.

The Court: "Must be judged at least in part."

Mr. Dixon: Isn't that a correct statement of what you have on the basis of knowledge and information which they had at the time?

The Court: That would cover the knowledge and information.

Mr. Dixon: Surely.

The Court: By cutting out 1 and 2, I am not, as you say, pinpointing anything.

I will give the last paragraph. Objection overruled.

Mr. Fowle: I might just add this one more factor, your Honor. It has got to be judged also on the basis of whether it was part of the conspiracy in this case. This singles out the refusal to give a comparable contract to the plaintiff.

The Court: "Must be judged on the evidence and instructions in this case and on the basis."

Mr. Fowle: "Must be judged"——

The Court: "Must be judged on the basis of the evidence and instructions in this case and upon"—and so forth.

Any further suggestions?

Mr. Fowle: We still have the objection it is unrelated [4308] to the conspiracy charged in the case.

The Court: All right. Overruled.

F. Let's save time and ask the plaintiff first.

Mr. Fowle: I would like to add one further objection, your Honor, so that we may make our record.

The Court: To E?

Mr. Fowle: To E, yes.

The Court: All right.

Mr. Fowle: That is, in view of the court's rulings with respect to evidence which in the court's view related to so-called after-acquired information, it seems to us that this instruction is not necessary and that it is prejudicial to the defendants.

The Court: Do you still want it, Mr. Dixon? You can read these overnight.

Mr. Dixon: You mean to stop there?

The Court: No. I am talking about the whole last paragraph of the insert I put in.

Mr. Dixon: The objection is that the court has already——

The Court: Because I excluded some evidence, that this makes it unfair. Do you want to think about it overnight?

Mr. Dixon: Let's think about it.

The Court: F.

Mr. Dixon: To this one, your Honor, we would like to have added the specific instruction on the law concerning the [4309] testimony of Mr. Lynch on the loss figures which he used.

The Court: I have that in mind. I haven't worked it out yet. I will have to do it tonight.

Mr. Dixon: That is our only suggestion at the moment.

The Court: That should be modified in the opening paragraph, that the plaintiffs have offered opinion testimony.

Mr. Dixon: They offered their financial statements.

The Court: "Financial statements and opinion testimony."

Mr. Dixon: For the purpose of showing their earnings.

The Court: "On the question of damages"?

Mr. Dixon: Yes.

The Court: "And the defendants have introduced opinion testimony concerning readjustment and reconstruction of financial statements of the plaintiff, also on the question of damage."

Mr. Williams: It also goes to causation.

The Court: "Damage and causation."

Now, in view of the duplication of the last paragraph and the fact that I couple these together, I could omit the last paragraph.

Mr. Fowle: Well, if the instruction is to be given at all, and again we think this is an instruction that is pinpointing certain aspects of the evidence, which is not being done generally in the instructions, we would object to it on [4310] that ground, and I would object to the final paragraph——

The Court: I will knock out the final paragraph. I said the same thing in E. Do you object to it?

Mr. Dixon: No objection.

The Court: Any objection on the defendants' part?

Mr. Fowle: Just a moment, please. Is this insert at the beginning?

The Court: "You are instructed that the plaintiffs have offered financial statements and opinion testimony on the question of damages, and the defendants have introduced opinion testimony concerning their readjustments and reconstruction of financial statements of the plaintiff also on the question of damage and on causation."

Then the next line is changed: "This testimony was admitted and may be considered."

Mr. Fowle: I think we would object to the inclusion of the phrase beginning in line 4, "their readjustments and reconstruction."

We suggest that that phrase be omitted, so that the instruction would read, "and the defendants have introduced opinion testimony concerning the financial statements of the plaintiff."

The Court: I don't care, except I want those exhibits changed before tomorrow. You know what I am talking about. Those exhibits that start out at the top, TreeSweet. I want [4311] some indication on them that they are not TreeSweet records. In some of them you have something indicated as to what it is, but you have got financial statements of TreeSweet kicking all over this case. Now, you have got some exhibits in there and they start right out at the top, Winckler & Smith—what am I talking about? I am getting punch drunk. I am saying TreeSweet.

You have got all sorts of financial records in here taken from the records of Winckler & Smith. Then

you have got your reconstruction headed at the top, Winckler & Smith Products Company, which makes it look as if they were also taken from the books of Winckler & Smith.

On one or two of them, which were merely in columns, a comparison of figures taken from Winckler & Smith's books, I am not objecting to that. You just took something there and something here. But on those that are your reconstructions, I want something on the exhibits so a juror won't get up and say, "Well, here is a Winckler & Smith exhibit right here and it shows so and so."

I will mark down here, "Exhibits headed Winckler & Smith."

Mr. Fowle: Mr. Fisher suggests they may already have been corrected. I don't know.

The Court: I don't either. But check up on that.

Mr. Fowle: Do you know, Mr. Dixon?

Mr. Dixon: I don't know. [4312]

The Court: Any further objection to Court's F?

Mr. Fowle: No, sir. [4313]

* * *

Mr. Fowle: I know what it is. I have it right here.

The Court: I know it was handed in by the plaintiffs and had no number on it, and we marked it as 38 and we laid it aside. It is on monopoly. You proposed 38.

Mr. Dixon: I don't seem to have it.

The Court: I will lend you my copy to look at.

You have got it here somewhere. You tossed it in and you had no number on it, and we gave it the next number in order, 38.

Mr. Dixon: Yes. I know now which one it is.

Did I understand your Honor to say that you would give [4321] that?

The Court: I haven't said yet.

What are the defendants' objections to it?

Mr. Fowle: We have two objections to it. In the first place, we proposed an instruction which dealt with the same subject. It was our No. 16-A, which we believe incorporated what should be in an instruction of this sort, and that is that in order to have monopoly power there must be the power to exclude competition and the power to determine the prices at which others sell. This instruction doesn't deal at all with the power to exclude competition, that is, competition generally. It deals with the power to determine prices, and it says in it at lines 7 to 9, "that if the defendants have the power to determine their own prices, or the prices of any other actual or potential supplier, then there may be a monopoly."

It seems objectionable to insert in there any reference to the right of defendants to fix their own prices.

Of course they have the right to fix their own prices. The question that should be considered when you are dealing with the problem of whether there is a monopoly is whether or not the supposed monopolists have the power by virtue of their control

to determine the prices at which others sell; not the prices at which they, themselves, sell.

Mr. Dixon: This is all right. [4322]

The Court: Did you hear the objection, or were you shuffling your papers?

Mr. Dixon: I heard part of it.

The Court: The objection is that it talks about the power to fix prices, but doesn't refer to competition. Also, it refers to the fact of fixing their own prices.

In view of the other instructions we have got on monopoly, why don't I just stop at the period on line 5? [4323]

Mr. Dixon: That instruction, your Honor, was an application of the power to the facts and the contentions——

The Court: What do you say to their objections?

Mr. Dixon: Monopoly power only applies to the power to fix prices. Price fixing isn't involved in that sense in this case. It is the power to determine the prices and terms and conditions at which they would be made available to independent processors or any other actual or potential supplier. In other words, if the jury finds that they were able to do that, then they would decide that they had monopoly power control over the amount of products oranges. Do you have a copy of the instruction, Judge?

The Court: No. I want that one back. Did you find yours yet? I have to have this back because I have to give it to the clerk.

Mr. Dixon: No.

Mr. Fowle: One of the objections to this instruction is that it says in effect it is for you, the jury, to decide whether the defendants have such power over product oranges that they can fix the prices at which they, that is the defendants themselves, sell products oranges.

Mr. Dixon: No, that isn't an isolation. That isn't the whole instruction.

The Court: You have got an "or" there. It should be an "and." [4324]

Mr. Williams: There shouldn't be any reference like that there.

Mr. Fowle: There shouldn't be a reference to the right of the defendants to fix the price.

The Court: You are talking about the phrase, "which may be made available to the independent processors by the defendants." Then you say "or." Certainly, in any event, it should be "and."

Mr. Dixon: To determine the price or terms and conditions at which they would be made available.

The Court: To independents by defendants or—you have or there. That puts it in the alternative. Certainly, as far as the defendants themselves, there would have to be a "and" in any event.

Mr. Dixon: Well, I have no objection to inserting the word "and." I think it may be all right as it is, but let's insert the word "and" then.

Mr. Fowle: We object to this unless the phrase "by the defendants or" is removed entirely.

Mr. Dixon: Well, counsel, the contention is under monopoly power that you have the power yourself to determine prices at which things will

be made available. If you have 100 per cent of the products, you determine the price and that shows you have monopoly power. That doesn't mean you can't do so.

Mr. Williams: What about price [4325] leadership?

Mr. Dixon: That doesn't mean you can't do so.

The Court: I will give 38, but I want Mr. Dixon to look at it again tonight. He hasn't got anything else to do.

Mr. Dixon: Oh, no.

Mr. Fowle: Also, your Honor, you understand our objection is there is no reference to the exclusion of competition.

The Court: Yes, and I want Mr. Dixon to get that point. They say this instruction talks about prices, but it doesn't talk about exclusion of competition.

Mr. Williams: And it could be price leadership.

Mr. Dixon: The question for the jury to decide under this instruction is whether the defendants had the power to fix their own price, which they have, of course. Anybody has that, but if it comes to a point where they fix the price and determine apart from price the conditions under which these oranges will be made available, not only on a sale price, but under any other arrangement, then you have control of the market and have exercised the power. Now, you would not have to exercise it illegally unless it is coupled with doing so——

The Court: All right. I want you to look it over again. I will ask you in the morning.

Have you any further objections?

Mr. Fowle: Yes, there are some.

Mr. Dixon: Do you have an extra copy? I don't seem to have this. [4326]

The Court: I took it back from you.

Mr. Fowle: In the light of what Mr. Dixon just said, we would have the further objection that this instruction really deals with only one portion of what a monopoly is in any case, and that there should be an instruction such as we proposed in No. 16-A, and similar to the one Mr. Dixon himself proposed as his own No. 33, which deals with the subject of monopoly as a whole, rather than breaking it down into its component parts. I believe Mr. Williams has one or two objections.

The Court: Do you have another copy of it, either of you, you can give Mr. Dixon?

Mr. Williams: He can have this one. It is marked up.

The Court: All right. Give it to him.

Mr. Williams: It speaks of the amount of oranges to independent processors. Independent processors might include—it is hard to tell who it does include. Does it include only someone other than the coconspirators here? Does it include American Fruit Growers, for example, or M.O.D. or someone who raises oranges and has a plant of their own?

Mr. Dixon: "It is for the jury to decide on all the evidence in this case," if they want that inserted. [4327]

* * * *

Mr. Williams: Your Honor, we have one objection that goes to 3, which I can state briefly.

The Court: Plaintiffs' 3?

Mr. Williams: Plaintiffs' No. 8, and the same objection relates to Plaintiffs' 8, Plaintiffs' 35, and to Defendants' 37 as revised.

The Court: What is the point?

Mr. Williams: Plaintiffs' 8 reads, "It is sufficient if you find any acts charged by the plaintiff to have been done pursuant to the combination alleged actually and necessarily resulted in the elimination of the competition of the plaintiff."

Our point is that elimination of competition of the plaintiff is not equivalent to unreasonable restraint of trade as required by the statute as interpreted by the courts. That same equating of those two things appears in Plaintiffs' 8, Plaintiffs' 35 and Defendants' 37, as revised.

The Court: What do you say to that?

Mr. Dixon: It is a question of law. If the elimination of the competition of the plaintiff does not constitute unreasonable restraint of trade, why——

The Court: You can content, are you?

Mr. Dixon: Yes.

The Court: I will look it over. The objections are now overruled unless I changed my [4329] mind.

The clerk has prepared two forms of verdict. See what you think of these. You will have to look at them together, because there are no copies.

Mr. Dixon: Satisfactory to the plaintiff, your Honor.

The Court: Both satisfied?

Mr. Fowle: Yes, sir.

The Court: Now, you have got a request for special interrogatories here.

Mr. Dixon: Plaintiff objects, your Honor, to the defendants' special interrogatories in this case.

The Court: What is the purpose of your interrogatories?

Mr. Fowle: Well, as your Honor knows, we have taken the position that Sunkist and Exchange Orange may not conspire between themselves. You have disagreed with us on that. You may be right. We may be right. If a verdict is brought in for the plaintiff and it is necessary for us to appeal, we will be unable to raise that point or preserve it unless we know whether or not some outsider was in this conspiracy. We won't know who the conspirators were at all. That is the reason for these interrogatories.

While it takes a couple of pages to state them, really all they do is ask the jury to tell us, if they bring in a verdict for the plaintiff, who the conspirators were.

The Court: If I give them one, I would cut this down so that where you have listed under 1 some material, it would [4330] read something like this:

If you find a judgment for the plaintiff, did you base it on:

One, conspiracy to restrain trade;

Two, conspiracy to monopolize;

Three, actual monopolization.

Mr. Dixon: Or both, your Honor, instead of the three.

The Court: Right.

Mr. Dixon: Conspiracy to restrain trade, conspiracy to monopolize, or both.

The Court: Then I would say, if I give them:

2. If you found a judgment for the plaintiff and have based it on conspiracy to restrain trade, was so and so a member of the conspiracy?

However, I wouldn't put them in this order. I would put them, Sunkist, Exchange, TreeSweet, Silzle—some other order than this.

Then I would say:

If you have found for the plaintiff and have found only a conspiracy to monopolize, did you find so and so as a conspirator?

Then probably a note on it:

If you have based your verdict for the plaintiff on both grounds, who did you find——

And so forth. [4331]

In other words, I would tie this in one with the other.

Mr. Fowle: Well, we would have no objection to that.

The Court: And I might even give it to them in a sealed envelope and say, "You don't even look at this until you have found your general verdict. Your first task is to find a general verdict." Not to gum this thing up any further.

Mr. Fowle: We would have no objection to that procedure here.

The Court: What do you say?

Mr. Dixon: We object to any special interrogatories in this case, your Honor. I think the jury is going to have enough of a job here going through a hundred and fifty exhibits, if they do, without having to answer a lot of special interrogatories.

The Court: It wouldn't be a lot. I could even do this. I could not even give them the envelope, which might indicate I have figured a verdict one way or the other, but wait until they have brought in a verdict, and then by agreement send them back up with the interrogatory.

Mr. Fowle: If the plaintiff will agree. All we want to know is if they find a conspiracy, who were the conspirators?

Mr. Dixon: Why are you entitled to know that, counsel? You get your answer through the verdict. I have never heard of such a thing. There may be some cases where they have done that, but I don't think it is customary except, of course, [4332] in a criminal case the jury find whether or not they were a member of the conspiracy by those who are indicated.

The Court: It cuts both ways. I am not saying whether I will do it or not. I may look it over. It cuts both ways. If you get a verdict, you are generally able to sustain it, with the sole exception here if they only found Lemon was the other conspirator, and I don't know how they could find that. If there is a verdict for the plaintiff, you can rest assured TreeSweet and Silzle will be listed as the coconspirators and not Lemon. [4333]

* * *

The Court: Now, I haven't got these typed up. I will have to read you a couple.

Court's T is something I was going to work over coming from my form 12-C, and here is what I have got on it. I think it ought to be acceptable.

"A corporation can act only through its officers, agents or employees. Any act of an officer, agent or employee of a corporation in the performance of his duties is held in law to be the act of the employer. It is for you to determine whether the 16-man executive committee and the joint management committee of 4 and the members thereof were acting in the performance of their duties and whether they acted for Sunkist or EOP or ELP, or all or some of such entities." [4347]

Mr. Dixon: I didn't think that was a question.

Mr. Fowle: We would certainly object to anything about a four-man committee. The evidence was there wasn't any such committee.

The Court: There was evidence that they met, and it was described as a management committee; and I am leaving it entirely to them.

Here is the problem: You say to a jury, A corporation acts through its officers, agents, servants or employees. Now, you have committees which were composed of people from different legal entities. It is purely a question of fact for the jury.

As to the form of this, we can talk about that later, but I am going to advise you that I am going to give an instruction such as that.

Do you want to hear the last paragraph again?

Mr. Fowle: Yes.

The Court: "It is for you to determine whether the 16-man executive committee, and the joint management committee of four"—I am using the word "management" there, which was in the evidence—"and members thereof, were acting in the performance of their duties."

If they weren't acting in the performance of their duties, then, of course, the acts don't bind anybody. "And whether they acted for Sunkist, or EOP, or ELP, or all or [4348] some of such entities."

In other words, here is a committee made up of officials from two different corporations. Who did they act for? That is a question of fact for the jury.

Mr. Fisher: I don't believe they were referred to as a joint management committee. It was a committee of managers.

The Court: "Committee of managers."

Mr. Fisher: It was also described as an informal committee.

The Court: I will give T, and if there is anything about the form of it that you want to talk about, we can discuss it later. But you are entitled to know what I am going to give.

Mr. Fowle: We would like the right to make further objections to this, if the court please, when we see the actual draft.

The Court: All I have to do under the rules is tell you what I am going to instruct.

Mr. Fowle: We don't have any objection to the first portion of it, which refers to corporations and

their officers, and so on, but I do think we may have objections to the phraseology of the second portion, if not the content of it.

The Court: And I am going to give Court's R, which I only have it written out in longhand, and it is long. It is an instruction as a matter of law as to what the reorganization [4349] situation is. All I can do is read it to you. I don't have it typed up. [4350]

The court believes it is its duty to inform you of the legal effect of Exhibit 84, which concerns the reorganization proceedings in 1948 and '49. Exhibit 84 consists of a petition by Winckler & Smith to present a third modified arrangement, and the third modified arrangement itself, and an order approving it.

The purpose of Chapter XI proceedings is to permit a debtor to propose a plan of arrangement. If the plan of arrangement is approved, the debtor's business and property then passes from the possession of the receiver back to the corporation itself.

Winckler & Smith was the debtor, and Mr. Lynch was the receiver from the time the proceedings under Chapter XI was filed until the approval of the Third Modified Arrangement. During this time the bankruptcy court controlled the title and possession of Winckler & Smith's business and property through its powers and through its receiver. So on February 14, 1949, Exhibit 84, this Third Plan of Arrangement, and the order of the bankruptcy court approving it, were followed. Both the plan and the order referred to in escrow were in

the real property and the plant of Winckler & Smith, and were being sold to Rubin, and $40,000 was to go from the escrow to the receiver Lynch to be paid to creditors, and referred to a second escrow, whereby other moneys were on deposit to be paid to Lynch, the receiver, to reimburse him for certain expenses [4351] from December, 1948, to the date of the approval.

To get everything accomplished, that is, to get the $40,000 from one escrow to the receiver, and to get the money from the other escrow to the receiver, and to get a clear title subject to the RFC loan to Rubin, and to get the hold of the bankruptcy court under Chapter XI released from the real property, so that the $40,000 escrow could be closed—to get all these things done the court made its approval of the third plan conditional. That is, the order could be set aside unless the things above were all done within a fixed time.

These things were actually done, so the order of approval was never set aside.

The court, therefore, instructs you, as a matter of law, that the sale of the real property and factory to Rubin, and the receipt of $40,000 from the escrow by the receiver, was a part of the Chapter XI proceedings. And, further, regardless of when the deed to Rubin was delivered, its effect related back to February 14, 1949, the date of the approval of the plan, and the date of the release of Winckler & Smith from the bankruptcy proceedings.

It follows, also, as a matter of law, and the court instructs you, that for accounting purposes, the

sale of the real property and factory by Winckler & Smith should be considered as occurring during the Chapter XI proceedings, [4352] and not during that portion of the Winckler & Smith fiscal year which occurred after the reorganization proceedings under Chapter XI. The loss of $169,000 and $175,000 resulting from the sale of the real estate and factory should not have been taken into account during Winckler & Smith's fiscal year ending January 31, 1950. Mr. Lynch was in error in so considering it, and the court was in error in permitting him to do so in his computations. [4353]

Mr. Walker: There is a Lynch referred to twice, there. It is a coincidence of names. Could the second Lynch be identified as the defendants' witness Lynch in some way?

The Court: Yes. All right.

Now, I know you object to this, but I think I am right. If I am wrong, the benefit is all on your side. [4354]

Mr. Fisher: Well, your Honor, we do object and ask that the objections heretofore made be incorporated by reference, and we will in part restate the objections.

It is our conception that the order providing for the approval of a plan simply required the deposit of the $40,000 by a certain length of time, and that the sale was entirely voluntary on the part of Winckler-Smith Citrus Products Company, not a requirement of the order; that the terms of the order could have been complied with by the deposit of $40,000 within the time limited in the order.

without any closing of the escrow; that the transaction there was a voluntary transaction, and even though it occurred during the time of the reorganization, could properly be considered in considering the earnings and profit of that particular fiscal year, and was properly taken account of by Lynch in his computations in the computation of profit and loss for that fiscal year.

Furthermore, I believe the debtor went in as a debtor in possession, and there was some period of time from the inception of the proceedings until Lynch was appointed a receiver.

The Court: I will modify that. I was not sure whether Lynch had gone in originally or came in later. That doesn't have anything to do with the principle involved.

Mr. Fisher: No. [4355]

The Court: It is a minor matter.

Mr. Fowle: We also object, your Honor, to the reference of error on the part of our witness Lynch as being prejudicial to all of his testimony and as being unnecessary as a part of this instruction in any event.

The Court: I could change "error" to "improper."

Mr. Dixon: You can instruct the jury to disregard it.

The Court: Those are matters of form. We can have this typed up and see about matters of form later on. The objection is overruled except as to possible matters of form. [4356]

* * *

OPENING ARGUMENT ON BEHALF OF PLAINTIFF

Mr. Dixon: May it please the court, and ladies and gentlemen of the jury:

We are now approaching the end of the case. As his Honor has stated to you, it is my privilege at this time to summarize the contentions and evidence that you have been listening to during the period of this trial, and to endeavor to tell you why we think you should, after considering all the evidence in this case, return a verdict in favor of the plaintiff.

Before I begin a discussion of the evidence, may I on behalf of the plaintiff; and I am sure on behalf of counsel for the defendants, express our sincere appreciation to all the members of the jury for the careful consideration that you have given this case. We know as lawyers that it is not always easy to understand the issues as they develop during the trial of a case. If you will bear with me for a few moments, I would like to refresh your recollection on the contentions of the plaintiff in this case and what we believe, now that the evidence is all in, that the evidence has proved to your satisfaction.

As you know, this is an action by the plaintiff against the defendants which is brought under the Sherman Antitrust Law, and the plaintiff charges a violation of Sections 1 and 2 of the Sherman law. You naturally are not going to take [4373] the law from me, but I find it necessary in this closing argument perhaps to briefly tell you something about

the Sherman law with the thought that you may better understand and comprehend the contentions of the plaintiff and the evidence that you have so carefully listened to during the long period of this trial.

The Sherman Act, briefly, provides that all combinations or conspiracies in restraint of trade, under Section 1 of that Act, and all combinations or conspiracies to monopolize any part of the trade or commerce of the United States, violates that law, and it gives to any private person or corporation who has been injured as the result of any such violation a right to bring an action for damages against the one who he claims caused the injury or damage.

Now, the one claiming the damage and injury in this case is, of course, Winckler & Smith, a private corporation, so-called, in which the stock is owned by private individuals and represents the private investment by those individuals into that enterprise. The plaintiff corporation was formed back in 1945, you may recall, for the purpose of entering the business of processing citrus fruit juices.

The evidence here indicates that its principal product was single-strength Valencia orange juice. It did process some other products, blended juices, some grapefruit juice, and some lemon juice, and other products, but about 75 per [4374] cent of all its business during the period of time it has been in operation related to the processing and selling of single-strength Valencia orange juice.

Now, the defendants in this case are Sunkist and

Exchange Orange. Sunkist is what is known as a marketing organization for the producers of the products of its members. It is entirely a marketing organization and is given certain exemptions under the antitrust laws which his Honor will describe to you, which give them, these growers of oranges, lemons and grapefruit, the right to organize together into an organization for the purpose of marketing their products.

Now, the defendant Exchange Orange is a wholly-owned subsidiary of the defendant Sunkist, that marketing organization. It performs, you may recall, as Mr. Armstrong, I believe, said, its function since around the 20's, the early 20's, when there was this by-product fruit problem, how to dispose of it, when a lot of it just was lost for there was no way to make use of it. So eventually there was organized this Exchange Orange for the purpose of processing by-product fruit that remained after the fresh fruit was sold, into these various products you have heard of manufactured or processed from by-product fruit.

Now, the evidence here clearly shows that at all times that we are concerned with Exchange Orange did not process itself the quantity of fruit that was left over after the [4375] fresh fruit had been marketed, so that there was always available for sale to independent processors like the plaintiff oranges, for example, that could be purchased for processing into citrus juice products. [4376]

Now, those products, such as Valencia orange juice, that was processed by this plaintiff was pur-

chased—I mean was processed and sold in competition—and that is the point that I want to suggest to you—in competition with the Valencia juice that was processed by Exchange Orange and marketed through Sunkist, as well as in competition with other citrus juices, particularly single-strength Valencia orange juice, that was processed by other independent processors, such as TreeSweet, Silzle, and some of the other companies that have been mentioned.

In other words, ladies and gentlemen of the jury, the plaintiff represented private venture capital, which went into this business of acquiring and processing the oranges into citrus juice products, and then selling them into interstate commerce, and selling them, of course, in competition with the products that were not only processed by Exchange Orange for the members of Sunkist, but also were sold in competition with products that were also processed from oranges by other independent processors, such as TreeSweet, Silzle, and some of the others that are mentioned.

So you have two kinds of companies that are involved in this case. You have the plaintiff, a private corporation, organized for the purposes I have mentioned. You have other companies, which we will call independent processors, that were organized by private capital to perform the same purpose, [4377] in other words, to engage in the business of buying the by-product fruit and processing it into these various products and selling it in interstate commerce.

But the point that I want you to keep in mind if you will, ladies and gentlemen, is that the products processed by the plaintiff and the other independent processors that you have heard mentioned in this case, were sold in competition, not only with each other, such as the plaintiff selling its product in competition with TreeSweet, but also, and at the same time, those products were being sold in the interstate market in competition with products processed by Exchange Orange, and sold for the growers through Sunkist, this great marketing organization that you have heard about.

Now, the commerce involved in this case is substantial. You heard the testimony of Mr. Armstrong, I believe it was, as to the year with which we are primarily concerned, that Sunkist sold an amount of approximately $150,000,000 worth of products, the greater part of which, about 80 per cent or more, was this fresh fruit. The balance of the 20 per cent represented the products, such as single-strength orange juice, frozen orange juice and these various other products.

The plaintiff, of course, comparatively speaking, was a very small factor in this industry, but during the period of its development it had built up and was building up a business in juice products, and selling those products in [4378] commerce in competition not only with the other independent processors, but also with Sunkist. And the volume of sales of those products average over a million and a half dollars a year in the years 1949 and 1950.

But that business, ladies and gentlemen, was built up by the private capital of the persons and individuals who put their money into this plaintiff corporation for the purpose, of course, of making profit, and under the rules applicable to our economy and our free enterprise system, it was the purpose of the Sherman Antitrust Law to maintain the competition between companies that were engaged in the same or comparable types of business, at least to the extent that there would be no combinations or conspiracies brought together on the part of any person whose conduct or action would have the purpose or effect of eliminating competition of another competitor, or of creating or maintaining a monopoly in any particular industry in which that competition was eliminated.

Now, that is the background in this case in which we start to present our discussion and argument. But I want you to keep in mind, as his Honor will charge you, that it was the purpose of the Sherman Act to prevent these things, the alleged restraints on competition in interstate commerce under Section 1, and to prevent monopolies under Section 2, of any part of our trade and commerce of the United States. [4379]

As Mr. Justice Hughes once said, The Sherman Act is the charter of our economic freedom.

And it is, I think, precisely that, because the United States is the only country, ladies and gentlemen, that has such an Act. And the purpose of it, as I have said, is to maintain our free enterprise system, and to protect it, and protect those who are

engaging in private venture capital operations, from any conduct on the part of anyone else that violates the Sherman Antitrust Law.

And where it is shown to your satisfaction as members of this jury that there was a violation, and that the plaintiff sustained any damage as a result of that violation, then you are entitled to determine not all of the questions of fact, as his Honor will instruct you, but you are entitled to determine the amount of the damage, and determine what amount should be allowed to the plaintiff if you find that there was a violation of the Sherman Antitrust Laws charged by the plaintiff in this case.

Now, as to the amount of damages claimed by the plaintiff in this case, the plaintiff claims that it has been damaged in the approximate amount of $800,000, by reason of the alleged violations charged here of the antitrust laws by the defendants Exchange Orange and Sunkist. Those damages are computed and estimated as follows:

The plaintiff contends that it was unable to process any [4380] single-strength Valencia orange juice in 1951, because of the acts complained of by the defendant which constituted this combination or conspiracy in restraint of trade, and that as a result of the violation, claimed violation of Section 2, the combination to monopolize the citrus juice industry by these defendants, and TreeSweet and Silzle, that the plaintiff, whose business it had been from the time of its incorporation to process and market this product, that in 1951 it was unable to

process and market any single-strength Valencia juice, so that it first sustained damage in the amount of what it would have made had it been able to secure a normal amount of oranges during the year 1951 for processing into single-strength Valencia juice, which amount will be determined on the basis of its productive capacity, as judged in previous years, the amount of oranges that were available generally in 1951 for such purpose, and the profit on that operation which the plaintiff was unable to perfect in 1951, which you have heard extensive testimony on, namely, that the claimed loss of profits was approximately $210,000 to $220,000, by reason of that. [4381]

I don't mean loss of profits. I will discuss that a little later. But I mean that $210,000 to $220,000 comprises a recoupment of the loss of 1951 of some $180,000 and the estimated profit if that additional product had been made available to the plaintiff and sales made.

In addition to that amount, you will recall the testimony here clearly shows, and it is not in dispute, that during the year 1949-50, the plaintiff put an additional amount of $100,000 in this business in new equipment, in approximate amount, in round figures. That, of course, was added to the business.

In addition thereto, the testimony is during the year 1949-50, an amount of approximately $50,000, I believe, around about $48,000, was spent in promoting and developing the sales methods for the new products which the plaintiff was about to offer

to the public in the frozen concentrate field. That is advertising costs which, of course, if the plaintiff prevails in this case, was lost.

Then in addition is the loss of plant and property which, under the appraisals before you and which you will have, indicated that in 1950 there was an appraisal of the plant equipment and everything connected with this business by way of physical equipment, of in excess of $600,000, which the appraiser called the sound value of the plant of the plaintiff. Of course, values differ. We will discuss that [4382] when we get to the question of damages.

But getting back to the contention of the plaintiff here, which is set forth in the charge which is on file in this case, the plaintiff contends, ladies and gentlemen, that the defendants Sunkist and Exchange Orange first had what we call a monopoly control over the amount of product oranges that were available to independent processors for processing into citrus fruit products in 1951. We contend that that power was abused by reason of the combination and conspiracy charged here in which TreeSweet in particular was one of the beneficiaries and a party, by so establishing through this monopoly power the price, and this is the thing I want you to recall, to remember in your discussions, the price at which independent processors had access to product oranges in 1951 for processing into single-strength Valencia juice.

The evidence, you will recall, was that 120-pound solids was $40 a ton. That was the Sunkist offered

price to processors such as the plaintiff here that were independent processors. They depended upon the growers of fruit and the various organizations that had them available for their very existence in that there was always this surplus of fruit that was available even in short years for processing into the products of these independent processors.

But that by reason of the monopoly control over the [4383] product oranges by Sunkist and Exchange Orange in 1951, this price in that year was stabilized, fixed at $40, and it was impossible as a practical matter, for the plaintiff, an independent processor, to go out and acquire oranges at that price from any source—they could be acquired if the plaintiff had wanted to pay $40 a ton for them, and process them into the products it was organized to process and sell, and still sell that product, the single strength Valencia juice, in competition with the products processed by Tree-Sweet, Silzle, other independent processors, and, of course, Sunkist itself.

In other words, by reason of the control, and the evidence here shows, and it is not in dispute, that in 1951 Exchange Orange and Sunkist had about 65 to 66 per cent of all of the Valencia oranges that were available for processing into juice products in 1951. Now, where else could they be acquired from?

They could have been acquired, the evidence shows, from practically only one other source, and that a limited source, another independent organization, not affiliated with Sunkist, but also an or-

ganization of growers which, you will recall, had Mr. Ward as their representative to sell and market their products for them.

Mr. Ward testified that the organization that he represented had about 15 per cent, I think it was, of the [4384] total amount of product oranges available during 1951 for sale or use. The balance was limited to M.O.D., that is another co-operative, and it offered practically none for sale because it processed all of them itself and sold them itself through its own organization. There were perhaps a few other isolated sources.

But we come down to practically two sources here in this case for any independent processor of product oranges in 1951. It was either Sunkist or it was the Independent Fruit Growers Association through Mr. Ward.

So that is the problem then, and Mr. Ward testified, and you will remember that, representing his growers, of course, he tried to get the same price, the Sunkist selling price if he could get it, in other words, the price for the industry and the amount that was available which was stabilized at the Sunkist price. Mr. Ward could hardly very well report to his growers that with the Sunkist price at $40, he was selling to processors for $30 or $20 on the same basis.

So the price in the industry was approximately the same from the two sources in 1951.

Now, what happens from that point, ladies and gentlemen? That is where the story starts and that is where we begin to have to discuss names and

places and contracts to show you what actually happened.

Before we get into that discussion of the evidence [4385] itself, I should perhaps again state to you, so that you can understand our contentions, because his Honor will charge you with reference to them. There are six of them which we claim constituted a part of the combination and conspiracy. Three of them I am going to briefly mention because I think they relate more directly to the injury than perhaps the others.

First is this one whereby it is contended by the plaintiff that Exchange Orange and Sunkist established the price of by-product oranges to independent processors like the plaintiff in 1951 so that the plaintiff could not purchase or acquire oranges from any other source at a lesser price that would enable it to have processed them and sold the juice product in competition with the products of other independent processors than the plaintiff. That is the first.

The second is that by reason of these contracts that you have heard about between TreeSweet, in particular, and Silzle, that oranges were made available by Sunkist and Exchange Orange to those independent processors, TreeSweet and Silzle, on a basis whereby they didn't have to pay this $40 price at all, but whereby oranges were turned over to them by Exchange Orange, not Sunkist—I want you to keep that in mind—were turned over to them by Exchange Orange under these contracts so that they had oranges made available [4386] to them,

that is TreeSweet and Silzle, on a basis in fact whereby they didn't have to pay this $40 price at all. I am going to discuss those contracts a little later, but that is the second contention. And that by reason of that advantage, that competitive advantage which was given to these two companies, and the monopoly control over the product oranges available to independent processors, which came from Sunkist, control of the product oranges that were available, that Silzle and TreeSweet were able to and in fact did process and sell a substantial amount of single-strength Valencia orange juice in 1951, whereas if they had had to purchase them, as the plaintiff was required to do, they couldn't have done so, they couldn't have processed any juice any more than the plaintiff could have done so and sold it in the interstate market.

The third contention is that the plaintiff, seeing this situation develop and unfold, early in July, 1951, when the price of oranges was maintained by Sunkist at this $40 level, and seeing at the same time, you will recall, I think Silzle came into the market rather early with some products, at least they came before the best part of the crop came out, over TreeSweet, but they were already in the market with juice at the $2.20 price—and I am going to discuss these prices a little later—but they were already in the market and the plaintiff could not figure out, ladies and gentlemen, [4387] how his competitor Silzle was able to come into this market and sell single-strength orange juice, pay-

ing a price of $40, and still make money, but that is what happened. [4388]

So early in July the president of the plaintiff corporation went to some of the officials of Sunkist and Exchange Orange and asked for—well, he didn't ask for it, it will be here in evidence, because he didn't know anything about the details of that deal at that time, but he knew the plaintiff's plant was not running, because it couldn't pay this $40 price and process any fruit, so it notified the defendant Exchange Orange, and the letter is here in evidence—you will find it, it is not in dispute, it was addressed to Mr. Finley—notifying that the plaintiff offered its facilities to Exchange Orange for processing purposes.

Bear in mind that it didn't know at that time about the agreement that actually was in existence with TreeSweet, and also in operation with Silzle. It wasn't yet reduced to writing, you will recall. But at that time his competitors, the competitors of the plaintiff, were selling and processing and distributing in interstate commerce citrus juices of the same kind, that is, single-strength Valencia juice, at a price that the plaintiff knew just could not possibly be one that they were paying for oranges secured from Sunkist.

Well, that is where the basis of the complaint starts, that request was made for comparable treatment.

Now, let us briefly go on from there. But before we do so, I think we should again point out what the evidence [4389] shows here, because I think it

bears upon this conspiracy to restrain and monop
lize the citrus juice market.

Before I get into that, I don't want to overloo
it, you know how you get started in discussion
the evidence and before you know it you are o
on another point and have forgotten something th
you want to present, so before I leave this monop
oly control point I want to direct your attentio
to the evidence on that point, because it is, I thin
very clear, not in dispute in this case as to wh
the situation was. On January 2, 1951, this is
Exhibit 72, Mr. Wilcox reporting to the executiv
committee of Exchange Orange on distribution
fruit, particularly Valencia oranges, said that th
Exchange Orange Products Company has facil
ties—just a moment—the Valencia estimate f
1951—I want to show you how good they are o
these estimates—is 485,000 tons eliminated fro
the industry, of which the Exchange will have ap
proximately 325,000 tons. In other words, in 195
they knew in January of '51 what the crop wa
going to be, and that they were going to have a
least two-thirds of the amount of Valencia orange
that were going to be available in 1951 for process
ing into citrus juice products.

Now, at that time Mr. Wilcox suggested, and th
is in Exhibit 72 that you will have with you in you
jury room, that working agreements be made wit
reliable outside processors, so that the Valenci
crop will be handled most [4390] efficiently.

Then he says, "The price of this fruit to be se
at the end of each two-weeks' period."

Then it was recommended that Sunkist be authorized to negotiate contracts with independent processors on some equitable basis.

This was way back on January 2nd, 1951, when they knew, at least by their forecast, how much crop was going to be made available.

You have heard about Exchange Lemon in this case. They are growers that grow primarily lemons, but they are also marketed through Sunkist. They also process for each other; that is, Exchange Orange will process for Exchange Lemon, and Exchange Lemon will process for Exchange Orange. We are not complaining particularly about that, as I will point out in a moment. But there were so many oranges in 1951 that Exchange Lemon was given 9371 tons to process, of which amount over 2,500 tons were rejected as unfit for juice. That is in Exhibit 13. In other words, some of them were either spoiled or just were inadequate, even when they turned them over to Exchange Lemon to process.

Going down to October 16, 1951, Exhibit 75, we find that Mr. Lindsay, the plant superintendent, is reporting to Exchange Orange that the largest tonnage received in recent years was received during the month of September. [4391]

He says, this is from the minutes, in September, 1950, there were 36,000 tons of Valencias credited to the pool. Solids averaged 131 pounds per ton, as compared with 115 pounds last September. Year to date receipts of all varieties total 254,000 plus tons at the end of September, compared with 213,000

tons for the same period last year, 203,000 in 194
and 212,000 tons in 1948.

Now, those are the defendants' figures. Thos
aren't the plaintiff's figures.

So in October when they were coming to the en
of the season for processing we find these figure
that they had the best crop, the most plentiful cro
the sweetest crop, and the most abundant crop o
product oranges available for processing that the
had had in a good many years.

If that isn't enough, ladies and gentlemen, t
show the adequate supply, more than enough, i
1951, just take a look at Defendants' FD when yo
retire to the jury room. That chart shows th
difference, and in every month during 1951 ther
was a greater amount of oranges available for pro
essing than in any of the previous years, and yo
will recall that the best previous year was in 194
I believe it was, when the plaintiff in this cas
processed over 12,000 tons, 12,800 tons, and had
profit of $140,000 in that year from those opera
tions.

So we start out with the fact that in 1951 we ha
the [4392] greatest amount of Valencia orange
available here in California for processing pur
poses that the industry had ever had. We start fro
that point.

Second, we find that the price—ordinarily suppl
and demand has something to do with price—bu
the price of oranges in 1951 remained stable unde
the Sunkist price schedule that you will have i
your jury room with you, at $40 a ton for 12

pounds solids. No reduction in price to independent processors like the plaintiff because of this greater supply, an abundant supply. The price remained stable.

Well, what happened?

We have this very anomalous and unusual situation in this industry where you have an abundance of supply of a product, you have an independent processor like the plaintiff in this business looking forward to making money in 1951, they had spent money to get their plant in shape, they had already spent it for the season's operations, then they suddenly find that they can't get any oranges at a price which will enable it, even with this great supply, to process any and sell it in competition with the other independent processors, as well as with Exchange Orange.

Now, the figures on this situation are the monopolization control, and it is that ability to control price that I am directing your attention to, as well as ability to control the source of supply that is important to start with in this [4393] case.

Exhibit CF, for example, shows the figures that I have just indicated to you, and the Sunkist percentage.

Exhibit CG shows that whereas Sunkist—and this is an important factor, too, that I want you to keep in mind—in 1949-50, let's call it the 1950 year, Sunkist or Exchange Orange only processed 7,600 tons into single-strength Valencia juice. That was the year, you know, in which there was a lesser amount available than there was in the previous

year. And if you will look at the price lists in evidence, you will find that in that year there were two price increases to independent processors; from $40 to $45 to $50 a ton during that year. No drop in '51, however. But in 1951 Exchange Orange processed just twice as many tons as it did in 1950.

In other words, Exhibit CG shows over 15,000 tons processed by Exchange Orange into single-strength juice in 1951, the year in which the plaintiff didn't have any. I am not complaining, as I will point out in a moment, of the fact that Sunkist or Exchange Orange processed these oranges themselves. That isn't the basis of this complaint here, as I will get to in a moment. They could have processed all of them if they had been able to do it. But I am just pointing out in passing that in 1951, because of this oversupply, if you want to call it that, or greater abundance of oranges, even Exchange Orange processed at least twice as [4394] many tons as they did in the previous year. And then these other figures on production here, all in the defendants' exhibit, will show you what happened during that year.

And it is perhaps not without significance that in 1951 with this new industry developing of frozen concentrates—and keep in mind the plaintiff was going into that business, too, it had put in new equipment, spent money for advertising these new products—that as against 11 per cent production of frozen concentrate in 1950, Sunkist or Exchange Orange jumped up to 58 per cent in 1951.

Well, there are other figures, and I am not going

to take the time, you can look at these exhibits, showing the increase in the amount of frozen concentrated juice that was processed by Exchange Orange in 1951.

But there again they have a right to process themselves all of it. We are not complaining about that. We are complaining about these deals that were made with TreeSweet and Silzle, the competitors of the plaintiff, and the competitors of Sunkist, that is what we are complaining about in this case—that as a result of those the situation developed that I mentioned, and that I mentioned before. But let us for a moment see how much single-strength juice was processed in 1951 from California oranges here in California.

Here are the figures. These are Exhibits 9 and 10 and are all in evidence. The Government figures show that in [4395] 1951 approximately 5,400,000 gallons of single-strength Valencia juice was processed in California and sold. A good part of it in interstate commerce. I don't know where it was sold, but we know from the testimony here that all of these companies, Sunkist, Silzle, and TreeSweet, sold this product in interstate commerce.

Now, of this amount, and these are figures, ladies and gentlemen, that I want you to keep in mind, because I think they have a great significance—Exchange Orange and Exchange Lemon, that is, Exchange Lemon you recall had this reciprocating agreement with Exchange Orange, and vice versa, so Exchange Lemon processed some of these oranges into juice for Exchange Orange, and that

probably was all right, we are not complaining about that either, particularly, but the total amount was 1,364,000 gallons that was processed by Exchange Orange in 1951 and Exchange Lemon. Here is the important figure. TreeSweet processed 2,381,788 gallons.

In other words, ladies and gentlemen, remember the figures on tonnage I gave you a few moments ago. Exchange Orange only processed 15,000 tons into single-strength juice in 1951, but here is TreeSweet, and the figures in this record show that they got from Exchange Orange, under this contract that I am going to talk about in a few minutes, over 24,000 tons of oranges for processing into single-strength juice in 1951. [4396]

In other words, they processed more than half again as many tons into single-strength juice as did Exchange Orange itself in 1951.

Now, Silzle didn't do so well. I am going to discuss that. They only produced 682,000 gallons. That was about 7,000 tons, I believe. But the three together, Exchange Orange, TreeSweet and Silzle, ladies and gentlemen, accounted in those figures for 4,400,000 more gallons out of a total of 5,400,000, or approximately 85 per cent of the total amount of single-strength juice processed in California by Exchange Orange, TreeSweet, Silzle and any other companies during the year 1951.

I say to you those figures are not without significance in this case, because it shows that the combination or conspiracy to monopolize this juice business was in operation and working, and that.

in fact, as a result of these contracts they did process, and, of course, sold all they processed, approximately 85 per cent of the total amount of single-strength Valencia juice processed in California in 1951. All this while the plaintiff, private venture capital, ladies and gentlemen, in this business since 1945—they had some difficulties, and I am going to discuss those with you, too, a little later—but they had been in business since 1945, they were looking forward to a good year, they knew of this abundance of supply, but they didn't process and sell a drop of Valencia single-strength juice in 1951. [4397]

While their competitors, TreeSweet and Silzle, as independent processors, had access to the oranges, processed them, and sold them, the products, in single-strength Valencia juice at a profit, and, of course, they couldn't have done this, ladies and gentlemen, unless Exchange Orange or Sunkist had made these oranges available to them for such processing, because everyone in this case that has testified, including Mr. Finley, including Mr. McMillan of TreeSweet, and I think one or two others, let's forget about the plaintiff and Mr. Winckler, the president of that company, but let's take the testimony of the others.

They all testified that no independent processor or anybody else could pay $40 for fruit in 1951 and process it into single-strength juice and sell it at any time in the market at anything except a great loss.

So instead of the big freeze in 1951, we have what

I call the big squeeze on as far as the plaintiff is concerned, because with this abundance of supply, the business to make use of it, he didn't process a drop of single-strength Valencia juice in that year.

The result was the California products and the market for California juice went to the competitors of the plaintiff, TreeSweet, Silzle, and, of course, Exchange Orange or Sunkist, the marketing agent.

Now, it is true there was a little bit more processed [4398] and sold. You are familiar with that arrangement made by Case-Swayne, and I will perhaps have time to discuss that with you a little later. You know how that happened, in any event. Mr. Ward testified he couldn't sell, and obviously he couldn't, his fruit at the $40 price or any other price even comparable or close to it, to any of the large buyers such as the plaintiff, who were the ordinary market for that product in 1951, because the price wouldn't permit it, so he was forced to make arrangements with the plaintiff either to concentrate or process the frozen concentrate, I think it was about 4,800 tons or so, total amount, into frozen concentrate, and he gave a little bit more, I think, to Case-Swayne, which was processed into single-strength juice.

But the source of those products was, of course, the Independent Producers, another co-op, represented by Mr. Ward who has testified that this year he made those arrangements because there was no alternative.

His 15 per cent, in other words, the amount that he couldn't dispose of as fresh fruit, the balance

left over from his growers, went to the plaintiff for frozen concentrate, and it went to Case-Swayne to be processed into single-strength Valencia juice under the contracts and arrangements that you will find in the record.

But there again it stems from the fact, ladies and gentlemen, that the monopoly control over the product [4399] by reason of being able to stabilize or determine the price at which the products would be sold to processors, remained in Sunkist and Exchange Orange, and that price never varied during the 1951 season.

Well, that brings us to the situation of these contracts and what happened to this amount of oranges that were available. Well, let's picture this situation. Here we have Mr. Kelly of Exchange Orange. He was the salesman for all these products oranges. You will remember that he testified he was the one that set the price at which oranges would be made available to independent processors, not only in 1951, but every other year.

How did he do it? You will recall his testimony that he went around and talked with independent processors who were the primary buyers of these products, I mean of products oranges. Keep in mind they had this wonderful forecast system, Sunkist did. They knew what the market was going to be. They knew how much was available in Florida and every other place. They made trips back and forth to Florida to get that information and get it first hand. That is in the record. They knew what the

market was going to be on juice in 1951. What did they do?

Well, Mr. Kelly said before he set the price in 1951, I think early in 1951, possibly, the price list came out some time, I think, around early April or May, I don't [4400] recall just which, that he went around and talked to TreeSweet, Silzle, Case-Swayne, and let's keep in mind, ladies and gentlemen, that the companies that were making single-strength juice, the big producer of single-strength juice in that market in 1951, was the plaintiff. 75 to 80 per cent of his product was single-strength juice. TreeSweet, about the same percentage of its production was single-strength juice. They made some other blended juices, as did the plaintiff. Then Silzle made some. Let's call them one of the larger producers, too. Then there was Case-Swayne. Case-Swayne, you will recall the evidence from Mr. Swayne, I believe it was, that this was a relatively small part of their business, this single-strength processing of juice, that they only produced—I think what they produced represented about between 25 and 30 per cent of their total production of all products. In other words, Case-Swayne made other products, processed tomatoes and food products generally. But single-strength was not the principal source of their products income. It was about 20 to 25 per cent.

Whereas with the plaintiff, it was at least 75 per cent, and of course Sunkist knew that. They knew what the plaintiff's production was, what its capacity was, and what its sales were from their sales

department, because they were well posted on those things.

But the important thing is that we have here really [4401] Exchange Orange, they are producing for Sunkist, and they produced 15,000 tons in 1951. We have TreeSweet with 24,000 tons that they got from Sunkist. We have Silzle with about 7,000 ons that they got from Sunkist or Exchange Orange, however you want to look at it. We have Case-Swayne who got their oranges, about six or seven thousand tons, I think it was, from Mr. Ward.

Then the balance, whatever it was, came from other co-ops which processed their own juice.

In other words, there is where the juice came from. There is where the potential source of the juice was in 1951.

Let's go back to Mr. Kelly and fixing the price of oranges. He testified before they even made any decision at Sunkist of what they were going to sell their products oranges for, he went to these independent processors. He said he went to Silzle, he said he went to Case-Swayne. I think those are the two. I have the testimony and if time permits I will read to you from it.

I asked him, you remember, "Did you go to Tree-Sweet?"

"Oh, yes," he said, "I probably did. I forgot about that."

I don't remember the exact language. If we have time we will get into it.

But the important thing is that the plaintiff here, [4402] an independent processor, whose busi-

ness, whose primary business it was, was not consulted at all by Mr. Kelly as to what the price should be, while the competitors of the plaintiff were, whether Case-Swayne, TreeSweet or Silzle. They were all consulted as to the price.

Now, you will find here, ladies and gentlemen, among your exhibits the fact that the plaintiff did purchase oranges and citrus products from the defendants. It is on their list, when they came out with this price list in the early part of 1951, May, I believe it was, again. They sent a copy of it to Winckler & Smith. It is here in the evidence in the file, in the documents, because they were a potential purchaser of oranges. They had always bought some. True, they didn't buy very many of them because there was a good reason for that, you will recall.

Prior to reorganization under Chapter XI, the plaintiff had bought over a million dollars worth of fruit from Sunkist and hadn't lost a dime on it. They had been paid every cent. That was Mr. Kelly's testimony.

But after that, for some reason, they felt they didn't want to do business with the plaintiff, and they didn't sell any except on a cash basis. They never inquired about their credit, you will recall. That is another matter which if we have time, I want to go into.

But the plaintiff did buy some oranges. It was a [4403] customer. I think it was over 1,100 tons. This is all in the record. Those were purchased from Sunkist in 1950. Maybe it was 1949. I don't recall. But, anyhow, the plaintiff was a customer. But it

was not consulted. It was an independent processor. It was private venture capital. It was not consulted like TreeSweet and Silzle were allegedly consulted, if they were, by Mr. Kelly before this price was set.

But here is the plaintiff again with this $40 fixed price, with an abundance of oranges, unable to get any at a price at which the plaintiff could process any and be competitive with his competitors. He goes to Mr. Kelly and says, "What can we do?"

Mr. Kelly says, "Well, the price is there."

On cross-examination, you know, I asked him, — when I had him on the stand, I think, "Does this price depend on supply and demand, or whatever it is, or how is it determined?" And so forth.

He said he always raised the price, but he never lowered it.

The price was raised, ladies and gentlemen, twice. It is in the record here in 1950 when there was a lesser amount available the price went up. Winckler had to pay a higher price in 1950. Winckler & Smith bought some and paid for them. The price went from $40 to $45, and then it went up to $50 in 1950. [4404]

But comes 1951, when there are more oranges than were ever available before in the history, according to the chart, as far as the period is concerned, available for processing. The price does not go down with the surplus. It remains the same. The price of $40 was all during the year to anybody like Winckler-Smith, but not, ladies and gentlemen, to the independent processors competing with the plaintiff in this market, competing with Sunkist as

well. During those years the price to them did not make any difference, because they didn't have to pay for the oranges. They were delivered to them under these contracts that I am going to discuss with you in just a moment.

So we have Mr. Kelly on the one hand telling Winckler-Smith, no, the price isn't going to go down. I want you to remember one of the reasons he said it wouldn't go down, ladies and gentlemen, he said he raised it, but he did not drop it, was that Sunkist had to protect these processors who had bought oranges at the price of $40, the $40 price, against a drop in inventory. That is his explanation. I hope I have time to read it to you. But that is here. You may recall it. The reason he did not drop the price is he had to protect these people who had purchased the oranges and had an inventory. I am going to come to that, because that is where Hyland-Stanford and Mission come into this case indirectly.

But to get back to Mr. Kelly, the price was there. It [4405] was not going to go down to Winckler & Smith. It was stabilized. Well, he said to Mr. Winckler to go over and see Mr. Finley and see what he can do. "I only sell oranges. What I don't sell I turn over to Mr. Finley and he processes them."

So there is the letter the plaintiff wrote to Mr. Finley in the record. There is testimony about many telephone conversations, one, perhaps, with Mr. Armstrong, but with Mr. Wilcox and Mr. Kelly and Mr. Finley by Mr. Winckler of the plaintiff here to

try to get access to this market on a basis that he could compete with his competitors, but he was told, "No, you can't have any oranges."

Mr. Finley finally told him that there were no oranges available to Winckler & Smith in the middle of July. This letter was never replied to. It speaks for itself. He was told over the phone and in personal conversations that the plaintiff could not get any oranges whatever from Exchange Orange under any arrangement.

Mr. Kelly said the price is fixed. So what could the plaintiff do?

Ward, on the other hand, at that time his price was still the Sunkist price, if there were any available.

From that point on we start to see what is happening here in this industry, what has developed, what had happened in previous years. [4406]

First, let's take a look at some of these other contracts, because I want to distinguish in your mind, if I can, the fact that the plaintiff does not dispute, we are not here complaining about it, any proper processing contracts, ladies and gentlemen. In other words, the growers of oranges have a right to organize under the law. They are exempted from a combination by special statute. In other words, if it wasn't for the special statutes, they would be charged with combining and conspiring to sell the products and to fix and stabilize the market price of those products. But they are exempted from that law which applies to everybody else, and we are not

complaining about that. They are given the right to do that.

They are also given the right to process, enter into processing contracts. That is where we begin to get into a little difficulty in this case insofar as the defendants are concerned. That is where they begin to get into a little difficulty, in our judgment. They can make a valid processing contract, and there are some that we regard as valid ones here in this case, ladies and gentlemen. I want you to study them, if you can, and will in considering this case, because it points up the difference between a real processing contract, concerning which we would have no complaint and could have no complaint, and the kind of a contract that they entered into with TreeSweet primarily and [4407] Silzle, not so much, but to a lesser extent.

Before we get into a discussion of these contracts I want to direct your attention to Exhibit 3-A which is the plan of pooling. In other words, this is the growers contract with Exchange Orange.

Paragraph 15 provides any fruit received by Exchange as juice grade fruit may be sold to processors other than Exchange Orange Products. They may be sold to other processors. I mean processors other than Exchange Orange. Exchange Orange, from this they might buy it on a fixed basis but, of course, they didn't. They were just turned over to them by Mr. Kelly.

But here is a contract which provides for sales being made to processors.

Paragraph 15 of 3-A.

Then B again emphasizes, in this same exhibit, B-1 says Exchange shall establish a schedule of prices at which fruit is to be sold which will reflect a separate price per ton for each pound of solids per ton ranging from 60 pounds to 150 pounds. According to these instructions, they did that.

That is the price list they sent out to Winckler & Smith. That is the price list you have here in evidence. You can look at it and see what it was. It didn't change in 1951. But that is the agreement that provided for sales [4408] to processors, contemplated sales to processors.

Now, here comes Mr. Winckler, as I said, of Winckler & Smith, one of the big independent processors of Valencia juice here in 1951, and asks Mr. Kelly and asks Mr. Finley and gets the turndown.

What happened? What are these contracts with these others that weren't available? Well, in 1950, there was one here you remember with Case-Swayne. It is Exhibit 71. It merely deals with turning over, I think, 493 tons of grapefruit, 479 tons oranges, that were turned over to Case-Swayne for processing into a blended juice. They were paid for that processing by Exchange Orange. Nothing wrong with it. The product in that case was turned back to Exchange Orange, and was sold by Sunkist, the marketing organization, you see. That is a processing contract.

Now, let's take a look at some of these minutes and arrangements, because there are some of them here, you remember, which authorize making proc-

essing contracts. In other words, the distinction I am going to suggest to you is this, that when you get the oranges under that kind of a contract, like Case-Swayne had in 1950, and as some of them were in 1951, the independent processor gets the oranges. He processes them into the products that Exchange Orange or Sunkist want, and turns it back to them and is paid for that operation. Nothing wrong with that, ladies and gentlemen. [4409] We are not here complaining about it. I think the law permits that kind of a contract.

In other words, that is a valid processing contract, because maybe these growers don't want to go out and put some money into processing plants, you see. The defendant here, Exchange Orange here, they put some money into that, but they don't want their money in these plants, so they always have to rely—I want you to get this, ladies and gentlemen—they always have to rely upon the independent processor like the plaintiff, like Silzle, like TreeSweet, or any other competitor of theirs, to take care of this amount that they themselves can't process. [4410]

And if they do it by a valid processing contract of the kind that I have mentioned, that they had with Case-Swayne in 1950, we wouldn't be here complaining about what happened to plaintiff in this case.

But that isn't the way they do it. They have got three or four different kinds of contracts or deals, and it is the last deal that they made with Tree-

Sweet and Silzle that we are complaining about in this case.

Well, to move along.

On July 18, 1951, the minutes of the regular board of directors meeting of Exchange Orange point out that they are going to enter into contracts with outside processors on frozen concentrates.

Fine. That is all right so far.

Then they begin to put this thing, which enters into the picture, and it enters into Section 2 of the Sherman Antitrust Act, because it shows in our judgment a purpose to monopolize and control this market, apart from the regular legitimate contract —here is what they say, and this is Exhibit ES:

"Any contracts entered into for such facilities"— talking about these frozen orange juice contracts— "would provide for the Exchange Orange Products Company having first call on the plant, which would mean that the companies could run [4411] their own product if they purchased Exchange fruit at times when the facilities were not being operated for Exchange Orange."

Well, that doesn't mean very much standing alone, but when you put it in the picture, I think you begin to see what it means.

Do you remember the Hyland Stanford contract? These minutes were July 18, 1951. That was just the time that Winckler & Smith, July 15th I think it was, had written to Finley and asked for some kind of a processing deal. Here is Hyland Stanford. I don't think I am going to have time to but briefly go over these contracts. There are so many

points in them that I think show the real purpose and what they were trying to do here. But here is the first distinction, the first thing about it. This contract, Exhibit 15, which is called a processing contract, with Hyland Stanford, and it is dated June 19, 1951, is tied into the fruit purchasing contract dated June 29, 1951. I don't think in view of the testimony of Mr. Finley that we should pay too much attention to the dates on these contracts, because you will remember the Silzle contract wasn't finally drawn up, even, and signed until late in September, although they had been operating under it for three or four months. This is called a fruit purchasing contract. Section 10 of that contract—in other words, under this agreement, oranges— [4412] I see that I am going to have to read some of this. Let's take the processing contract first. I am sorry, I am getting a little confused here with these many exhibits.

"The processor is to be paid for producing the concentrate."

Well, of course there is nothing wrong with that. But the thing that is important here in that connection, in a sense, is that the overhead expenses of the processor are to be included in this payment for processing, and in addition thereto a reasonable profit on the processing operation.

We are not necessarily kicking about that, if that was a separate deal. It is important only to this extent: That if you had one of these contracts, you see, your overhead would be absorbed, because you are going to get paid for a good part of it in

the processing season, and have a profit on the operation, if you got one of these contracts.

Now, the purchasing part of the contract, this is Exhibit 16, says:

"Exchange Orange is to be the only supplier of oranges to Hyland Stanford, unless mutually agreed upon, because of the inability of seller to supply requirements."

In other words, this is a tied-up kind of a deal, you see. And I think it was testified to by Mr. Finley that he made this kind of a deal because he thought they did him [4413] a favor in giving him the plant, so they should give him something in return.

There is a lot, as I said, ladies and gentlemen, in these contracts, but they are all the same. But here we begin to see a little different type of arrangement than the actual arrangement made between Exchange Orange and the other company back in 1950, Case-Swayne.

Now, here comes the Mission Dry deal. And this agreement, Plaintiff's Exhibit 17, dated August 9, 1951, provides that Mission Dry shall process the oranges turned over to it by Exchange Orange into products for Exchange Orange, of course. But the agreement provides:

"This agreement is a supplement to the fruit purchasing agreement entered into between these parties."

The fruit purchasing agreement is 17-A, and I will come to that in a moment. But here, again, the

overhead expenses and a profit are guaranteed to Mission Dry on the operation.

These contracts were to continue unless cancelled.

Then, going back to the fruit purchasing agreement with Mission Dry, that is 17-A, and that agreement was dated June 1, 1949, and continued in effect, this again requires them to purchase all of their requirement of oranges from Sunkist, and it sets forth many, many provisions here that time does not permit me to discuss or to bring out. [4414]

May 1, 1951, we have this minute from the Exchange Orange Company minutes: The manager read a proposed fruit contract to be discussed with General Foods Corporation covering their fruit requirements for the Valencia season.

Then in addition to the fruit contract it is proposed to have a processing contract with General Foods, so that the Exchange can use their facilities in the event General Foods do not need their facilities for their own products.

The general form and so on has been approved, the prices and charges for custom packing are to be negotiated with General Foods.

Pursuant to that they did enter into this agreement, Plaintiff's Exhibit 18, fruit processing contract, again in 1951, containing substantially the same or similar provisions as in the other two types of contracts.

Now, there again we are not complaining particularly about that, but we are getting a little close to the edge. They are tying up facilities of independent processors so that Exchange Orange can

have them, and at the same time they are saying, "You take all your oranges from us."

So that has an effect, as I think Mr. Ward testified, on closing this company to him as a potential buyer of oranges from the independent companies and co-ops that he represents.

Now, on June 13, 1951, Exhibit 34, we find that they [4415] are trying to get facilities to process frozen concentrate. Keep in mind the plaintiff had frozen concentrate facilities, too, that he put in in 1950, which they did use in 1951 to a limited extent under the Ward contract, but here is what the manager says:

"Cold Gold and Harts Fruit Products are not going to operate for their own account this season, and these facilities will be available to EOP. He stated he has not been in these plants for several years and will look over their facilities, but did not want to do so if it were not desirable to do business with them."

I don't know what that means, ladies and gentlemen. You may have occasion to consider that. They didn't want to do business. That was a condition, apparently. All they are trying to do is get a processing contract. They did make one with Harts, and it is a true processing contract.

We are not complaining about it, because it, again, is the same kind of a contract on frozen concentrate that they made with Case-Swayne in 1950 on blended juices.

Under this deal, as you read it, you will find that

Harts is paid for the processing operation at a stipulated price, which gives them some profit.

And keep this in mind, ladies and gentlemen of the jury: If you remember the testimony on the Harts' situation, Mr. [4416] Finley said that he knew before he made that contract that Harts was in financial difficulty, and it is in this record, you may recall, that they ultimately made an assignment for the benefit of creditors.

But they got a contract.

At least it helped carry some of the overhead for that company in 1951.

Now let's get down to the TreeSweet contract.

The Court: Let me interrupt now. We started late, and it is 12:00 o'clock and I didn't take a recess. I didn't think we were going to go this long. Do you want to stop now for lunch?

Mr. Dixon: Yes, your Honor, this is a good stopping time.

The Court: Do you think 1:30 will be a good time?

I kept you a little long this morning, an hour and 20 minutes, but I am going to give you recesses as we go along, because it is pretty hard to listen continuously.

Both of these counsel have a right to have you people listen to their arguments.

Remember the admonition of the court. The case is not yet submitted to you, so don't make up your minds, don't discuss the case.

You will be excused until 1:30. I don't want any confusion about this. 1:30 this afternoon.

(Whereupon a recess was taken until 1:30 o'clock p.m.) [4417]

February 7, 1956—1:30 o'Clock P.M.

(The following proceedings were had at the bench outside the hearing of the jury.)

The Court: We have got the reporter's draft of R, but I have had it typed up. In the second paragraph, I am going to correct this business about Lynch being the receiver from the beginning.

On the last page, there are some minor corrections. On the last page, line 4 will read, "and Mr. Lynch, the expert witness for the defendants." Strike out "was in error" and say "should not have so considered it," and so forth.

Then here is the court's T, which I read to you and which is now typed up.

Mr. Strachan: I think Mr. Fowle has made his objections once before, and I don't think this entirely cures it.

The Court: We can talk about that later. I just wanted to hand it to you now.

Also, I will hand you B—well, I guess I handed you that already. It has been retyped is all.

(Recess.)

The Court: The record will now show the jury present. I can only explain this by saying facetiously that we have been giving you a bad time since December 12th, and possibly the jury decided to give us a bad time now. [4418]

All right, Mr. Dixon, you may proceed.

Mr. Dixon: May it please the court and ladies and gentlemen: This morning before we adjourned for lunch, I referred to certain contracts that Exchange Orange had entered into with Hyland-Stanford, Mission Dry, and Bireley's, General Foods, as indicating, along with the type of arrangement that was made in 1950 by Exchange Orange with Case-Swayne, the various types of arrangement that Exchange Orange entered into with independent processors.

I endeavored to point out that the Case-Swayne type was a type of arrangement whereby the fruit was processed and turned back to Sunkist or Exchange Orange.

Under the type of arrangement with Hyland-Stanford and Mission, Hyland-Stanford and Mission acquired the fruit on a deferred payment basis and in consideration therefor and as part of the same transaction, there was this type of contract entered into whereby they furnished and made available to Exchange Orange their facilities for processing oranges into concentrates under an arrangement whereby they were paid for the processing, and the processed product was turned back to Exchange Orange. That is almost the same kind of contract, if you separate it from the deferred payment deal, as the one with Case-Swayne, but the two are tied together, you see, and under those contracts Hyland-Stanford and Mission acquired all of their requirements of oranges that they

wanted for their own products through [4419] Sunkist.

Now, there is another type of contract that is important in this case, and I am coming to that now. I suggested before we adjourned that we were about to take up and consider the TreeSweet contract. Because under the TreeSweet contract, ladies and gentlemen, there was no outright purchase of fruit from Sunkist, or Exchange Orange, as there was under the Hyland Stanford, Mission contracts, which were tied into a separate and additional processing contract.

The TreeSweet, you have heard something about some of the provisions of that contract, but before we go into it, I think it is well to take you back to the year 1947, when we find out that this kind of an arrangement was first entered into between TreeSweet and Exchange Orange.

You may recall, before we start into that, though, that this price situation in 1951 remained the same. Mr. Kelly said that he set the price and it stayed that way. But I asked him on cross-examination, as part of our case, "Did you reduce the prices throughout the year?"

He said, "That is correct. Although there was no change in price in 1951."

"Was that customary?"

His answer was, "No, it was not. Most years, in fact, all of them that I can remember, we started at a minimum price, and then as it was justified, raised the price. There would not be many price changes." [4420]

You remember in 1950 there had been two increases.

I said, "Is that customary? In other words, to reduce prices?"

"Well, late in the season we did make some sales in 1951, small amounts, but we did not reduce prices once they were established, and for this reason: that I would financially cripple processors if I reduced the price. Once they had built up an inventory, these inventories were sold, some currently and some carried in stock, over a period of months, and if I reduced the price then I would cause them to suffer a loss on all the inventory they had on hand. And in some cases I understand they guaranteed the prices against their own decline in the warehouses of wholesalers."

That is from Mr. Kelly's testimony about why he kept the prices up and didn't reduce them, and particularly in 1951.

So we again direct your attention to the fact that under this deferred payment kind of contract that Hyland Stanford and Mission entered into when they also made their facilities available, they didn't have to pay for the oranges that they acquired until they sold the product, you see. In other words, they could carry it along in inventory, but they only paid for it under that contract when they sold it.

That is a little different kind of arrangement.

So we come now back to this TreeSweet arrangement, and [4421] that is the arrangement that the plaintiff complains about in this case. We think

the others give a competitive advantage, but we do not contend in any way that they contributed to the injury of the plaintiff in this case, because for the most part they were processing pasteurized products and not single-strength Valencia juice.

I think Mr. Kelly said something about having made an arrangement, or at least that there was a problem in 1947 on the price situation, and at that time, this was when Mr. Finley said that this arrangement with TreeSweet actually started and got under way. Again, however, Mr. Finley said in 1951, when I was asking him about the Silzle contract—you remember that he testified that he had to contact or reach Mrs. Silzle, she was in the Valley somewhere, and he finally did. My question was:

"Did you do this at Mr. Kelly's suggestion to make these oranges available to Silzle?"

He said,

"No, because that was decided earlier in the spring that we would make oranges available to the single-strength processors."

"Q. All on the same basis, I presume?"

"A. Yes. That is what we wanted to do, was treat them all on the same basis."

That is one of the questions, ladies and gentlemen of [4422] the jury, you are going to have to decide in this case. Because that is the contention of the plaintiff here, that it did not, of course, get any equal consideration as an independent processor from Exchange Orange.

Now, this arrangement in 1947 is one that wa started at a time when there were inventory prob lems.

You may recall at the same time that the plain tiff in this case during the year 1946 had packed a substantial amount of citrus juice cocktail, packed for inventory. You may recall the testimony of the plaintiff that there was a sharp drop in that inventory in 1947, which resulted in a substantial loss in excess of half a million dollars to the plain tiff.

Of course being the size company it was it couldn't take that loss. As a result of that, the proceedings under Chapter XI that you have heard testified to were instituted. [4423]

But the reason was that the inventory loss, re sulting from buying oranges at a higher price and then having to sell the inventory at a lower price, was what brought about the trouble with the plain tiff in 1947.

Now, this didn't happen to TreeSweet. I mean they had comparable troubles. Let me now proceed to what Mr. Finley had to say about that situation. This came out on the testimony of Mr. Finley on direct examination.

"Will you explain the circumstances under which the first TreeSweet agreement of this type was worked out in 1947 and explain your reasons for working out this arrangement."

Mr. Finley replied:

"It was in 1947. TreeSweet was buying the fruit,

canning the product"—the same as the plaintiff in the case was doing. "Along about September, after he had enough pack which he figured he could sell at the then going price, usually about September we get preliminary estimates from Florida what their opening prices are going to be, in October and November, and he did not want to pack for inventory."

TreeSweet told Mr. Finley that TreeSweet did not want to pack for inventory, so in his discussions with Sam Kelly—remember Mr. Sam Kelly said there was a problem in [4424] 1947 about the product oranges—the party whom he bought the fruit from, he told him he was going to have to shut down. In other words, TreeSweet was going to have to shut down, weren't going to take any more chance on packing inventory at the prices then prevailing.

There was a lot of fruit then, so this contract was entered into in the first instance with TreeSweet in 1947 to enable TreeSweet to avoid having to pack inventory loss, taking a chance, rather, on a loss.

Now, the plaintiff was in the market at the same time and at that time had bought about a million dollars' worth of product oranges from Sunkist. They packed this product and had the difficulty mentioned which resulted in the reorganization proceedings in 1948 and '49 and their financial difficulties.

They lost about a half million dollars from that inventory loss.

Now, you will find that whole story, ladies and gentlemen, in Plaintiff's Exhibit 39, which is the one in which in 1951 the plaintiff filed its application, you remember, to get authority to sell additional stock for financing purposes, to obtain additional capital with which to carry on its extension of processing operations into the frozen concentrate part of this industry.

Now, with that background, let's proceed to analyze [4425] these contracts with TreeSweet.

The first written one, that is Plaintiff's Exhibit 21, bears the date of July 27, 1949. It is more or less in letter form, but it sets forth the general provisions under which TreeSweet in that year was able to acquire fruit from Exchange Orange to be processed into single-strength juice without having to pay for it. In other words, at the same time the plaintiff, if it wanted any fruit, it had to pay cash, if he purchased any from Sunkist, here was TreeSweet at the same time getting the advantage of this kind of a contract whereby oranges in the amount that they wanted to process were made available to them under this contract.

The provisions of paragraph 8 of this contract, and this is important, ladies and gentlemen, are as follows:

TreeSweet agrees to purchase their requirements from the Exchange—in other words, their requirements of orange juice that they themselves were processing—at the Exchange price in effect at the time of the purchase, less—then comes these various allowances, including, after label allowance—there

wasn't any advertising allowance in 1949—the other allowance of 15 per cent, in addition to all the other allowances mentioned.

Paragraph 9 of this Exhibit 21 then says:

TreeSweet agrees to purchase from Exchange all of the juice packed by them and to pay for same by January 1, [4426] 1950.

In other words, they had this advantage here of packing, carrying it as inventory during the period, and in this particular contract in 1949, they were required to buy what was left at that time from Exchange Orange.

Now, there are various appendages to the contract which point out various other advantages and modifications. For instance, there was no trucking charge. TreeSweet didn't have to pay that.

If Winckler & Smith acquired some oranges at that time, they had to pay the selling price, as set forth in the price list issued by Sunkist, and in addition, of course, there was a trucking charge on bringing them to the Winckler & Smith plant.

None of those charges did TreeSweet have to pay.

There was a little difficulty or discussion, apparently, in 1949, about this 15 per cent, as to whether it was to come before or after these discounts. On August 16, 1949, after this arrangement had been under way, Mr. Finley wrote and said in paragraph 3 of his letter, which is part of this exhibit which you will have, 21:

"The EOP Company agreed that the 15 per cent cash discount as mentioned in paragraph 8 of the original agreement shall apply against the gross

sales price before any deductions for label allowance." [4427]

In other words, they take the Sunkist selling price as the basis of getting the 15 per cent discount.

Now, in 1950, we find something in the minutes of Exchange Orange about these contracts for that year. July 11, 1950, Exhibit 23, Mr. Wilcox of Sunkist reports on a discussion which he had with Mr. McCracken of TreeSweet regarding processing of fruit for single-strength juice during the year 1950 and the possibility of having a working arrangement, it is called, with the Exchange, as they have had for the last three years, ladies and gentlemen. In other words, this agreement had been in effect under these minutes during the time that the plaintiff was endeavoring to rehabilitate itself and compete with this combination.

Mr. Finley stated that the arrangements with TreeSweet were for the benefit of loose fruit sales and the EOP Company would be more than willing to co-operate, as it has to be done through EOP because of pooling arrangements.

Now, August 15, 1950, Exhibit 24, we find this reference:

The manager reported that the contract had been negotiated with TreeSweet in which EOP makes fruit available to TreeSweet and they process for EOP at cost. The cost fluctuates, they say, depending on the volume of the pack.

In other words, the cost of processing, and under this contract that was paid to TreeSweet—would

fluctuate [4428] according to the amount processed, according to this exhibit.

TreeSweet purchases the pack—ladies and gentlemen, I want to emphasize that—TreeSweet purchases the pack from the Products Department at the EOP price in effect at the time of purchase less specified discounts. The contract period ends—now, this year, not January 1st, but February 1, 1951, at which time TreeSweet must purchase the remaining inventory. [4429]

In other words, they have been given an additional month's time now, on any inventory carryover, to dispose of it. They didn't have to pay for it until the 1st of February under the contract in 1950.

Now, the 1949 and '50 contracts are somewhat similar, but I am going to take the time, since I know you are not familiar with it, to point out some of the provisions of these contracts.

In 1950, of course that was the year in which there wasn't so much fruit, you will remember, and Sunkist made two price increases during that year, from $40 to $45, to $50, and that is in your price lists that you will have with you in the jury room. During this year TreeSweet didn't have to worry about any increase in the price of product oranges, because they were turned over to them under the contract, and here is the way they were paid for processing it.

Paragraph 3 of 22 says:

"The EOP Company will pay to TreeSweet weekly"——

"Weekly," ladies and gentlemen——

"the processing costs."

In other words, that is the cost of manufacturing or processing these oranges into single-strength juice. And then is set forth the amounts under which they are to be paid, and the basis of it, and you will remember the testimony [4430] in that respect was that Exchange Orange took TreeSweet's estimate of costs on that. They did so because they compared them and they were satisfied that they were comparable to Exchange Orange.

But in any event, TreeSweet was paid on a weekly basis for processing this fruit. So in addition to getting the fruit, processing it into a product that they were ultimately required to buy, and which they could sell in commerce, they were paid the processing costs by Exchange Orange while that was going on.

Then they set forth,

"The EOP Company will pay trucking costs."

In other words, that is a factor that plaintiff had to pay whenever it bought fruit; not only the $40, but it had to pay the cartage cost to bring it into the plant.

That TreeSweet doesn't have to pay.

Then on the oil provision there is this provision of interest; that TreeSweet will return the oil produced, but if EOP does not request TreeSweet to recover the oil, TreeSweet will not recover it for their own account.

And the record in this case, ladies and gentlemen, shows that in the year 1949, it is either '49 or '50, that there was no money paid to TreeSweet for processing any oil. In other words, under this provision the oil was wasted. That is, from an economic point of view. [4431]

That isn't too important in this case, but it just points out and points up the fact that under this contract that was what happened.

Supplement No. 1, dated August 31, 1950, relates to this oil proposition, because it says.

"Effective August 31, 1950, Exchange Orange wishes for TreeSweet to recover orange oil from the fruit TreeSweet is processing for the Exchange Orange Products Company."

That is the arrangement in 1950.

It seems to be getting a little better each year.

Now we come down to the 1951 contract.

I think you are already familiar, ladies and gentlemen, with the background and the situation on prices, and the price situation with reference to the selling price of Valencia orange juice during that year. I am going to discuss that in a moment when we get down to the prices. And the effect of these contracts in eliminating competition, price-wise, between TreeSweet and Exchange Orange on this product. The same would be true of the Silzle contract. In 1951 the contract bears the date of July 23rd—rather, September 11, 1951. This contract, ladies and gentlemen, in 1951—and this is Exhibit 20, you will have this with you in the jury room as one of the numerous exhibits—bears the date

September 11, 1951, effective July 23, 1951. In some respects [4432] it is very much like the Silzle contract, again. But before we go into that, let me again refresh your recollection that prior to this date, Plaintiff's Exhibit 45, which you will have with you in the jury room, and after the plaintiff had endeavored without success—after talking, first, with Mr. Kelly, Mr. Wilcox, and Mr. Finley, and back to Mr. Kelly—the plaintiff finally did write a letter, and it is dated July 16, ladies and gentlemen, and obviously written after numerous conversations—Mr. Finley said he only had one conversation or two conversations, one some time in the middle of July and the other in September—well, I don't think these things just grew or came out of a void, it is for you ladies and gentlemen to decide whether there were prior conversations, but this letter was obviously written after some conversation had been had with somebody in Exchange Orange and Sunkist. But here is the TreeSweet contract. Now, the evidence will show, and I am going to discuss that in a few minutes, that TreeSweet got the cream of the crop as far as oranges were concerned that were available for processing into single-strength Valencia juice. In other words, the testimony is that they started this processing operations not in the latter part of June, as did the independent processors like the plaintiff, or as did Silzle, or as did Case-Swayne, because you remember the fruit isn't quite ripe at that time, it is not quite sweet enough yet, [4433] but TreeSweet starts with the pick of the crop, ladies and

gentlemen, under this contract; and they start late in July, and then throughout the season, as long as the Valencias are available they continue to get the cream of the crop.

Now, Mr. Finley said that there was a shortage, you will remember, of Valencias in 1951.

Well, of course there was a shortage, to the plaintiff, but not to TreeSweet. There was no shortage of oranges at any time to TreeSweet. They got them right throughout the season.

They said some time in September they had to cut them down a little bit. But there wasn't any actual shortage, that is the point that I want to definitely explode at this time.

But getting back to this contract. They say here, and this isn't too long, but the letter to Mr. McCracken, dated September 11, 1951, by Exchange Orange, on this contract, points out the following things——

Bear in mind they have been operating under this arrangement, ladies and gentlemen, all through August, and a good part of September, and we will discuss that in a moment. This is part of the letter:

"We have made one change in the contract which we feel you will be in agreement. The change is that under Section 10 we have added the [4434] sentence, "Whereby the processor will be required to purchase and make payment to the supplier for all inventory still on hand on June 1, 1952."

Ladies and gentlemen of the jury, the other

contract started with purchase of inventory in January, the next one by February. In 1951 they can carry this inventory that they have processed, which they are obligated and bound to pay, and for which they don't have to pay except on the basis of the Sunkist selling price at the time of the purchase, they can carry this inventory right down to the commencing of another processing season.

Well, maybe that is fair to independent processors. That is for you to decide, ladies and gentlemen.

Now, this is what it says, further:

"Also, in connection with the contract signing we are perfectly agreeable that the inventory you had as of July 31, 1951, that was of the 1950 pack, should be considered as the first sold under this year's sales. According to your records you have the following cases on hand: July 31, 1951"——

Then they list some 2500 cases that TreeSweet still had on hand from the pack of the previous year.

In other words, this was what was left a year later from the pack of the previous year. They hadn't had to pay for it, didn't have to finance it as did the plaintiff, and [4435] under this arrangement, at the bottom of the market, they were able to sell, or buy that and sell it at the two-twenty price, ladies and gentlemen.

I am going into those prices in a minute.

Do you think Mr. Kelly was protecting somebody on inventory drop? Well, you are the ones to decide that, ladies and gentlemen of the jury.

And there is still some more:

"According to the arrangement between the two organizations the supplier is to pay you"——

That is Exchange Orange——

"for the processing of orange oil and for the cost of hauling the oranges to your plant. You as processor are to pay to us the funds from the sale of wet peel. Beyond this point you as the processor are to use money received from the sales of the products to offset the weekly processing costs that, according to Section 3, we were to pay to the processor each week. This should be watched carefully, and should the sales proceeds begin to materially exceed the processing cost, then funds should be remitted to the supplier. In any event, this is to be thoroughly analyzed October 31st and a determination made as to what the future policy will be at that time." [4436]

"Also TreeSweet is to continue to send through their purchase orders to us in the regular manner as their sales are made."

Well, that was the arrangement. I mean this is the letter. The contract is explicit for carrying out the arrangement. There is a clear intention and it shows the manner and method in which this contract operated insofar as TreeSweet is concerned, and TreeSweet, ladies and gentlemen, was a competitor of this plaintiff, who was one of the larger, one of the two remaining independent processors; the greatest part of whose product was single-strength juice, and TreeSweet was also a competitor of Sunkist in selling single-strength Valencia juice.

There are some other nice provisions in this con-

tract about processing. One is, "Should the processor's cost of cans and cartons change during the pack, processing cost will be adjusted by the actual amount of such cost changes."

Ladies and gentlemen, they had this down to such a fine point that if the price of cans went up, TreeSweet didn't have to worry about what they had to pay for them. Not like the plaintiff. No, indeed. Under this arrangement that was added to the additional cost of processing this fruit under this contract which TreeSweet was bound to buy and which they in fact thereafter bought and sold in commerce, in so-called [4437] alleged competition with Sunkist.

Well, there are some other provisions in here, but there is one in particular that I want to mention that was not in the other contract. That is that in this 1951 contract, TreeSweet was given an additional 7 cents advertising allowance—that was not in any of the other contracts—per case. That gave them an additional amount. If you figure it out, it runs into several thousands of dollars by way of additional discounts for so-called advertising purposes, an advertising allowance.

To advertise what? Sunkist products? No. The testimony in this record is that TreeSweet, from Mr. Finley's testimony, didn't have to spend a dime of this in any way they didn't want to spend it. By way of explanation, he said, "Well, Sunkist had a big advertising program in 1951."

You will recall that they had appropriated a very substantial amount. The record here shows there

was approximately, as I recall it, a million dollars to advertise the Sunkist name. They had theretofore paid a million and a quarter dollars to buy the full rights to the Sunkist name.

Yet they gave them an allowance, not to advertise Sunkist products, but to spend as they wished by way of an additional part of the privileges that they got under this contract. Then follows in paragraph 10 the provision that I referred to, that TreeSweet agrees to purchase from the [4438] Exchange all the juice packed by them under their own label, and to pay for the same as sold. Processor is to purchase and to make immediate payment on all inventory still on hand June 1, 1952.

In other words, the testimony here, ladies and gentlemen, is that not a can of this juice ever went to Sunkist, ever was sold by Sunkist under the Sunkist or Exchange label, or any other label that Sunkist might have asked TreeSweet to put on this product. This whole pack, every can of it that was processed from the more than 24,000 tons that were made available to TreeSweet under this arrangement in 1951, was sold by TreeSweet under the TreeSweet label.

That is the testimony of Mr. McCracken. It was not the Sunkist or any other label but the TreeSweet label.

Now, attached to this contract is various other data on the cost. It shows how they determined the cost and how they were applied to the processing operations.

Now, I want to point out one obvious advantage of this kind of arrangement—I am sure you have perhaps already seen it—and that is that under this arrangement is an overhead, which is always there to any processing company engaged in seasonal operations, and in this one it is fully taken care of. No worry about a supply of fruit, no worry about inventory, no worry about financing or carrying the inventory. Just pay for it as it is sold. You are paid for [4439] it while you are processing.

Well, we have heard a little bit about Exchange Lemon in this deal. Exchange Lemon, all the members of it, you recall, sell their fruit through the Sunkist marketing organization. I want to point out in passing that Exhibit 31 shows that fruit, that is lemons, were made available to TreeSweet under an arrangement in a sense comparable to that. They didn't pay for the lemons. This is an attachment to Plaintiff's Exhibit 31, which is a letter from Lemon Exchange to TreeSweet.

"The following is our understanding of the terms under which Exchange Lemon is furnishing lemons effective April 1, 1951"——

Then they talk about the oil and peel, and they say, "The balance of the fruit is to be billed to TreeSweet at 57 cents per gallon for the lemon juice processed or contained."

Now, this is a memorandum attached to this deal which explains it further and shows how it is to be delivered insofar as Exchange Lemon is concerned.

"Mr. McCracken called this morning in reference to our discussion Saturday and we have agreed

upon the following basis on fruit sales, retroactive to cover the approximately 1,800 tons delivered to date for which final settlement has been made. We will consider the arrangement as a price [4440] arrangement rather than a cash sale insofar as our own internal records and pool payments are concerned."

There are some omissions here.

"However, insofar as our relations with Tree-Sweet are concerned, the arrangement will be considered as an outright sale of fruit."

3,249 tons of lemons were made available to Tree-Sweet under that arrangement in 1951 by Exchange Lemon.

Now, just to apply this situation to the plaintiff again—before we get to that, the only reference in the records, I mean the minutes of Exchange Orange with reference to this deal in 1951, Tree-Sweet is only mentioned in the minutes of September 19, 1951, and that is contained in the manager's report in those minutes, in which he says:

"TreeSweet production has been cut one-half and it was felt every effort should be made to have some Sunkist and TreeSweet single-strength juice on the market over the winter, even in limited supply, so as to keep California single-strength juice labels on the market."

In other words, Exchange Orange and Sunkist wanted to be sure that their label and the Tree-Sweet label was on the market in interstate commerce throughout the year. What about, ladies and gentlemen, the independent processors that were

trying to compete with TreeSweet, such as the plaintiff, under that kind of arrangement? [4441]

Now, I think I will proceed, while I am on these contracts, to discuss the Silzle deal. It is a little different deal than the TreeSweet deal. I am going to discuss Mr. Finley's testimony on that, the differences, and so forth, when I get through with the provisions of this contract.

But here again we have a rather extended document, Plaintiff's Exhibit 25, which is dated September 10, but relates back again to the original arrangement. I want to discuss something for a moment as to how this arrangement got under way, because you will recall that this transaction apparently started in 1951, when Mr. Kelly called Mr. Finley and asked him whether something could be done early in June about the oranges that had been delivered to Silzle.

Now, we had on the stand Mr. Kelly and asked him about Plaintiff's Exhibits 6, 7 and 8, which are the delivery sheets covering the delivery to Silzle of Valencia oranges during this period of time. There was first a price stated on there around $44, depending on the soluble content. There was a pencil drawn through that, the early part of those delivery sheets, and then after the first 500 or so tons had been accounted for, there wasn't anything on them. It was just the amount of delivery.

Mr. Kelly couldn't explain what that was. He said, "I don't know a thing about it. I don't know anything about the records. I never saw them be-

fore. I don't know why this [4442] was penciled off."

Mr. Finley said substantially the same thing, he didn't know anything about the records.

But on cross-examination, as part of the plaintiff's case, you may remember I asked Mr. Finley about this deal with Silzle, and he said, "I got a call, as I mentioned, from Mr. Kelly, asking"—and bear in mind Kelly is the one that is selling the oranges, they worked together, that is the point I want you to get on these arrangements, Kelly works with Finley, and vice versa—"whether or not they could charge Silzle for a certain amount that had been delivered on some juice basis."

Well, after an extended discussion apparently some arrangement was worked out. But the first deliveries, which added up to about 525 tons under that arrangement which, according to some of these invoices, would have been billed and if paid for by Silzle would have cost in excess of $40 a ton for fruit, they got it, you know, on a $22.50 basis for the first 525 tons. After that they, of course, got the oranges for the balance of the season.

Now, Mr. Finley said, "In working this out, I tried to get in touch with Mrs. Silzle, I thought she was the one running the business," and, you remember, had an awful time reaching her, finally found her down somewhere in the valley, called on the phone and persuaded her, so he says, to get [4443] her to accept oranges for processing under some arrangement that was apparently never too definite, not reduced to writing.

Mr. Clark, the secretary of the company, apparently didn't know what it was. He said the payment arrangement was all kept in suspense until something definite had been worked out.

But in the meantime Silzle was getting the oranges and processing them into juice and selling them in the single-strength Valencia juice market, which is the important thing to any independent producer.

The plaintiff was not doing that because they couldn't get them.

But if you examine the Silzle contract, it is called a purchasing agreement, ladies and gentlemen, under quantity, this provision appears:

"The seller is to make oranges available to purchaser for conversion into canned orange juice under the purchaser's labels."

In this kind of a deal there is nothing said about label in the TreeSweet deal. Here they come out and say, "You put your own labels on this." In other words, the testimony is, you know, that Silzle was not a label buyer. Most of their products of single-strength juice that they took, they put out under the so-called buyer's label. In other words, they packed what the trade called shiners, and when [4444] they got an order for a few hundred cases, or whatever it was, of a particular buyer or particular brand in a certain market, they put the labels on and shipped them out. Silzle wasn't competing labelwise, ladies and gentlemen, that is the fact I want you to get here, with either TreeSweet

or Sunkist in the interstate market for Valencia juice.

In other words, all the juice that was put out under the Silzle contract went out under private labels, and on some occasions under the label that Silzle put on when they made the sales directly themselves. So they weren't concerned in this deal about keeping any California label, such as Tree-Sweet or Exchange Orange, on the market, as the minutes showed in the September minutes. It didn't make any difference here. They were to go out under any label that Silzle wanted.

Then on the price situation, this provision follows that I mentioned. The first 527 tons delivered under this agreement shall be priced at $22.50 a ton.

Ladies and gentlemen, if you will refer to these Exhibits 6, 7 and 8, and compare them with the price list, you can see that that was just about half, if you don't even take into consideration the carton, the price which the plaintiff or anybody else competing with Silzle would have been paying for the same fruit had they bought it at the same time from Mr. Kelly of Sunkist.

Then follows these other arrangements. "And on [4445] approximately 2,362 tons to cover the production of"—then they list, strangely enough, 57,300 cases by sizes. In other words, they could only do this if it had already been done, ladies and gentlemen. How do they know they would pack and sell 57,300 cases of a certain size?

The price f.o.b. as follows: Then get this provi-

sions—"the fruit shall be paid for according to the sales prices of the canned juices," and then follows the prices. The sales price per case, $2.20 for the 12/46.

You have heard about that before. That is the price, the opening price, you see, not the price in September when this contract was made, but the opening price, according to the price lists that I will discuss in a moment of Sunkist, and then less these discounts, or less these allowances. [4446] 27½ cents per case for sales expense, brokerage and profit, on a 12½ per cent basis.

TreeSweet got 15 per cent. Silzle only got 12½ per cent.

Label allowance, 5 4/10ths cents.

Manufacturing costs, $1.35.

Advertising allowance—bear in mind here that Silzle did very little advertising, because it wasn't a label company. Plaintiff was. Plaintiff was selling Anagold under its label. They got an advertising allowance. They got the trucking on the fruit, $1.10 per ton.

And then we find that they paid 40 cents plus, per case, for the juice processed under here and sold to them at $2.20 a case.

And there was a "C" deal.

These are important only in that they show, ladies and gentlemen of the jury, the adjustment of this inventory and pack to the rising or falling market, so that Silzle could not sustain any loss on this arrangement, any more than TreeSweet could possibly sustain any loss under their deal.

1,047 tons will take care of 27,750 cases, and the prices on these shall be as follows: The fruit shall be paid for according to these sales prices of the canned juice:

Then the same formula, except the price is $2.50 a ton.

Well, the price had gone up in the meantime, you see, [4447] and Silzle had been able to sell and had disposed of this that they had processed on the rising market without any danger of having to get stuck with a $40 fruit price that they complained about at the time they started in processing single-strength juice in 1951.

Then the terms of payment. Price A, which covers 527 tons, has to be paid immediatcly.

Prices B and C. And then it says, "Payment due immediately upon making shipment when production does not go into storage."

In other words, they could do either one. If they sell it, they pay immediately. If it went into storage, they didn't have to pay for it until it was sold.

"The purchaser is to mail on the day following shipment a check supported by copy of bill of lading. The purchaser, if it wishes, may obliterate the name and address of its customer. Payment shall, however, be made according to whether the shipment was made under orders received under B or C sales prices."

In other words, this two-pricing system that you have heard about, where California and Arizona—where the products are processed—is the higher price, and then if it goes outside of that area the

price is lower. So Silzle could buy it at $2.20, but they had to show where it was going, to get the $2.20 price. [4448]

If it went just here in California or Arizona, then they paid the $2.50 price.

Then the warehouse receipts, that is conditioned upon whether or not the purchaser's check covered a "B" or a "C" sale.

The fruit prices paid to seller—that is to Sunkist—are to be as set forth under prices B and C.

This is a sale of fruit, according to this contract. You would think they were buying oranges, but they are actually only buying juice, which they have already sold.

"Fruit prices paid to seller are under the prices B and C, whether the goods are actually sold or destroyed."

In other words, there was an absolute obligation on Silzle under this contract to pay for this fruit. This didn't go to Sunkist at all.

And, then, the provision covering the examination of the records of Silzle, and then there was a provision, that to me at least, in view of the time at which these contracts were executed—bear in mind this is September 10, 1951—"right of termination" —look what it says:

"Time is the essence of this agreement."

Then there were several supplements to this contract.

Supplement No. 1:

"It is further agreed that seller"—— [4449]

That is Sunkist or Exchange Orange——

"is to attempt to supply an additional quantity of oranges to producer approximately 15,000 running cases more of canned orange juice than is itemized in the agreement."

This is still dated September 10, 1951.

Then it tells how this fruit is to be paid for, and here follows the prices $2.35 and $2.65, because it has gone up, apparently, for the amount of the 15,000 running cases that have been processed and sold in the meantime under this arrangement.

Then on February 1, 1952, Mr. Clark, who testified here that he never did know exactly what this arrangement was, that it was all with Mrs. Silzle—incidentally, we tried, as you know it is stipulated here in the record that Mrs. Silzle was subpoenaed by the plaintiff, and we couldn't reach her, and she did not appear here for the defendants, but she apparently was the one with whom Mr. Finley made this arrangement. It says here on February 1st, signed by Mr. Clark, to Exchange Orange Products:

"Enclosed is report of inventory movement"—I emphasize the words "inventory movement," keeping in mind the TreeSweet complaint back in 1947, they weren't going to pack any more inventory, and here they had, of course, an [4450] inventory——

"for period November 29 to December 31, 1952."

Then it says:

"Confirming telephone conversation with your Mr. Jim Finley and our Mr. Wurgaft, an agree-

ment was entered into January 7th whereby 12,000 cases could be sold at the following noted prices:"

Then we have the $2.20 price and the $2.50 price.

Then it says:

"The sale for this merchandise will be negotiated immediately and payment for this merchandise will be made pursuant to the terms of the original processing agreement."

And that is okay by Exchange Orange.

Then on February 6 is Amendment No. 1 to Supplement No. 1. It says:

"It is agreed that purchaser"——

that is, Silzle——

"may sell outside the States of California and Arizona a running total of 12,000 cases of canned orange juice at the following prices:"——

and then is set forth the prices of $2.20 and $2.50.

And, "All terms and conditions of purchasing agreement are applicable to this amendment."

There, ladies and gentlemen, are the provisions of the TreeSweet and Silzle contracts, competitors both of the [4451] plaintiff and of Sunkist, in the interstate market, for single-strength Valencia juices.

It is one of the contentions of the plaintiff in this case that this arrangement between TreeSweet and Exchange Orange, and Silzle and Exchange Orange, had the effect of eliminating all price competition between TreeSweet and Exchange Orange, or Sunkist, the selling agent, in the market for California Valencia juices.

When you keep in mind the figures that I gave

you at the outset, that the total amount processed by TreeSweet and Silzle and by Exchange Orange constituted 85 per cent of the total processed in 1951, I think the significance of this becomes even more apparent.

There wasn't any trouble in Sunkist selling single-strength juice in 1951. You will recall it was a fast market. Sunkist was constantly out of single-strength juice.

Exhibit No. 28, in particular, I direct your attention to, because these are the sales announcements by the Sunkist selling department, which sells Valencia orange juice, of the price situation, and of the amount available, and so forth.

On August 20th, 1951, Mr. Thompson of Sunkist notified all his brokers to this effect—this is part of this Exhibit 28:

"* * * and because sales to date of both Sunkist and Exchange Valencia unsweetened [4452] orange juice have been well in excess of our expectations, we wired you Saturday that, effective immediately, we were withdrawing our offering."

"* * * we expect to re-enter the market shortly—perhaps in two weeks."

September 4th:

"Fresh fruit receipts increased considerably during the period * * *"

The price situation was discussed. Then it says: "With Florida juice in somewhat short supply, you should find many buyers eager to submit orders for prompt delivery."

On October 17th, it says:

"Frankly, our sales have exceeded current production"

on single-strength Valencia juice.

So there wasn't any trouble selling this product. Yet, Sunkist in 1951 gave TreeSweet 10,000 more tons for processing into juice than it itself had.

The price schedule is in evidence. 27 is the price schedule of Sunkist selling prices for Valencia orange juice. 36 and 36-A is the selling price schedule of TreeSweet. If you will take the time, ladies and gentlemen, to examine those schedules and compare dates, you will find, for example, that the opening price for California and Arizona of [4453] both TreeSweet and Sunkist, on August 3rd, was $2.50; that on the same date, for outside California and Arizona it was $2.20. And then follows the various prices. And whenever Sunkist changed, TreeSweet changed, and the price was identical. And Silzle to the same effect. To the extent that the Silzle prices entered into this arrangement. And if you analyze it, it could hardly be otherwise.

The effect was to stabilize and to eliminate, ladies and gentlemen, all of the competition, pricewise, between Sunkist, TreeSweet and Silzle, in this product; to, in effect, create a monopoly control over the product. In a fast market, when the records here clearly show there was a high demand for more than was available to Sunkist, yet we have this transaction in effect.

What was the plaintiff doing all this time?

Well, you are familiar with the problems that the plaintiff had. He couldn't get any juice. Didn't

rocess a case of single-strength Valencia juice in s plant in 1951. It had many customers for those roducts, and you recall the testimony of the plain- ff that in late September and early October, I elieve it was, that Ralph's informed the plaintiff at if they couldn't give them some juice pretty on, some Valencia juice, they would have to kick e product out, as he put it, from Ralph's, a very bstantial account for the plaintiff. [4454]

Plaintiff, then, working through Mr. O'Donnell, les manager, called TreeSweet and finally got for is customer a carload of orange juice.

Mr. Strachan: Mr. Dixon, wasn't that Sunkist at sold the juice, rather than TreeSweet?

Mr. Dixon: I don't think it makes too much fference.

Mr. Strachan: It was Sunkist, and not Tree- weet. And it was a carload of juice.

Mr. Dixon: Thank you, counsel.

The Court: What about a recess? Is this a good me?

Mr. Dixon: Yes, it is, your Honor.

The Court: All right, ladies and gentlemen of he jury. Remember the admonition of the court. ou will be excused for a short recess. Court will emain in session.

(Whereupon, the jury left the courtroom and the following proceedings were had in the absence of the jury.)

The Court: The record will show the jury absent. I will return something that you loaned me here.

Here are some corrections, and I have also typed up for you the court's instruction Q, and the court's P, which we talked about.

What is your estimate on additional time, Mr. Dixon?

Mr. Dixon: I am certain not over a half hour.

When did we start?

The Court: You had an hour this [4455] afternoon.

The Clerk: I figure two hours and 22 minutes.

The Court: About that, yes.

You have had about two hours and 20 or 22 minutes. The clerk says 22 minutes. I haven't figured out exactly.

Mr. Strachan: Your Honor, I looked over the notes, and there are one or two preliminary matters that I can take up this afternoon.

The Court: If Mr. Dixon doesn't run too long, and you want a few minutes, we will let you have a little time.

Mr. Strachan: Perhaps 15 or 20 minutes. We could go, perhaps, to 4:00 o'clock.

(Recess taken.) [4456]

The Court: Let the record show the jury in their proper places. Proceed, Mr. Dixon.

Mr. Dixon: Ladies and gentlemen of the jury, I inadvertently indicated that this purchase was made from TreeSweet. I intended to say it was made from Sunkist, and if there is any question about it, the exhibits are here in evidence of the 1,400 cases. Exhibit 49 shows the invoice and the

amount charged Winckler & Smith for these 1,400 cases. Incidentally, it was a 10-day sale, if you will notice, but it was paid for at the time of delivery and discount taken by the plaintiff.

Now, Exhibit 50 is a statement showing what TreeSweet was paying for a case of the same size at the same time under its contract. By comparing these two exhibits, you can clearly see in operation the discrimination in effect of this arrangement, not only on competition, but on the plaintiff in this case.

Here was the plaintiff endeavoring to keep a customer. Didn't have and couldn't get and couldn't process any single-strength juice. It was told by one of its big customers, either get us some or we will throw out your product. So the purchase was made, and the actual difference in price, ladies and gentlemen, 1,400 cases, is over $400.

That demonstrates better than anything I could say [4457] one of the advantages which the competitor of the plaintiff had under this contract, and again keep in mind, ladies and gentlemen of the jury, that TreeSweet was supposed to be a competitor of Sunkist in the market for single-strength Valencia juice.

Now, you remember I asked Mr. Finley when he was on the stand about this $40 price as follows:

"You knew if anybody wanted to buy oranges from Sunkist and process them into single-strength juice, they would have to pay the $40 price if they bought them from Mr. Kelly. That is a fact, isn't it?"

Mr. Finley said, "That is a fact and I knew that."

I emphasize "and I knew that."

Then I said, "You just couldn't turn out orange juice, process it the way it is processed and pay $40 for oranges from Sunkist and sell the juice processed therefrom at, say, $2.50 a case for 12/46 cases?"

The answer is, "Yes, sir, I knew that."

Now, ladies and gentlemen, here is Mr. Finley with knowledge and, of course, he couldn't escape the knowledge, that independent processors competing with TreeSweet could not possibly buy fruit and stay in business by processing it into single-strength juice and selling it in competition with TreeSweet, Sunkist or anybody else that had this kind of a deal. [4458]

Now, rememeber I asked Mr. Finley on cross-examination, after he had been on as part of the defendants' case:

"I think you said the reason this arrangement was entered into was because TreeSweet told Exchange Orange or Sunkist that they weren't going to pack any more inventory and carry it and take the risk, shall we say, of a loss from a drop in the market by having the money tied up in a pack, is that correct?

"Yes, that is correct. You usually sell your pack in the Valencia season about 60 per cent during the packing season and 40 per cent is carried over into inventory, and they would not be willing to buy

fruit for the $40 price because of their experience in 1947."

That was the same experience that the plaintiff had.

"So to permit them to avoid any risk from a drop in the market price on any inventory that might be carried by TreeSweet, assuming they processed it themselves, this arrangement was entered into with TreeSweet back in 1947, wasn't it?

"A. It was.

"Q. Did you state at that time to other independent processors that this kind of an arrangement was being made available to TreeSweet?

"A. No, I did not.

"Q. Did you state to any independent [4459] processors in 1948 that you had this kind of arrangement with TreeSweet? A. No.

"Q. 1949?

"A. No, I did not, not up until 1951."

Now, I just want to discuss that 1951 situation a moment. I think perhaps we could deal with it simply by saying that Mr. Finley claimed he made this same kind of deal available to Case-Swayne in 1951. You remember the testimony of Case-Swayne, they never got down to brass tacks, they never offered the kind of deal TreeSweet had, they never offered them a contract. They perhaps offered to make oranges available to them for processing purposes under some arrangement, but they did not make the TreeSweet deal, and Mr. Finley's testimony clearly shows that.

Now, the reasons why they made this deal are

very interesting. You remember on cross-examination Mr. Finley admitted that TreeSweet right here in Sunkist's back yard, right here in Los Angeles, outsold the Sunkist single-strength Valencia juice here in its own area where it is manufactured and processed.

Then on this question of carrying the overhead, I said:

"Q. This TreeSweet arrangement that you call grower participation carried, did it not, a substantial part of the operating overhead of TreeSweet when Sunkist [4460] paid the processing cost billed to it under these contracts during the various years?"

Mr. Finley said in answer, "It carried its proper share of the overhead."

In other words, TreeSweet was also, like the plaintiff, manufacturing other products, lemon juice, and various other products, but it was primarily, like the plaintiff, a producer, a processor of single-strength Valencia orange juice.

So that is the story on this, and Mr. Finley wound up, you remember, on my cross-examination by saying—I asked:

"I believe you stated that no other independent processor had this type of contract up until 1951 except TreeSweet."

The answer is: "That is correct."

And the reason he gave, you may recall, was that they had this label, this reputation, national reputation, and that they had a sales organization.

Ladies and gentlemen, to me that was about the

flattest excuse I have ever heard for giving a contract of this kind. Here is Sunkist in the same year, the year just preceding this, it paid a million and a quarter for the name, the right to use the name, and it had appropriated several hundred thousands of dollars for the advertising of the name and the Sunkist products in 1951, and that is here in [4461] the record. The figures are available. And yet Mr. Finley felt that they should have this kind of a deal because they had a good sales organization.

I ask you, ladies and gentlemen, what was the matter with the Sunkist selling organization? Couldn't it sell its own product? Couldn't it sell Sunkist Valencia juice?

Well, that's the situation with reference to these contracts.

Before I close this part of it, I want you in the jury room, if you will, to look at Defendants' FE, which sets forth the various types of arrangements that Exchange Orange had, various types of contracts, and I think it does as good a job as anybody could do in summarizing the arrangements, and you will find the Hyland-Stanford, Bireley's, Cold Gold, Hart's contracts, I have talked about here, all listed under the heading, "For EOP's account," forgetting tie-in contracts. That would be perhaps a true processing contract, ladies and gentlemen.

Then we get over into the twilight zone, the deferred payment kind of contract which Hyland-Stanford and Mission Dry had, because of the tie-in. You remember in that situation they made their plants available, but they agreed to purchase

their requirements for processing purposes, but they didn't have to pay for them again until they sold. [4462]

Then in this last column we have standing alone through the various years starting 1947, 1948, 1949, 1950, TreeSweet under the heading, "Grower Participation." Ladies and gentlemen, "Grower Participation."

In 1951, they added Silzle. But here is Mr. Finley's testimony that he wouldn't give any processor in this area a contract like the TreeSweet contract. So the Silzle contract can't be properly placed in that category. In my humble judgment, it was just a situation where they had more fruit, that is the record, more fruit than they could take care of. Exchange Lemon had to get rid of approximately between 2,500 and 3,000 tons of oranges because it was not fit for processing. They had oranges coming out of their ears because there were more oranges in 1951 for processing than any previous year. But Silzle came in. Silzle got it, got, shall we call it the slop-over, to use a very poor term, what was left. But they got it, even under the arrangement which the plaintiff's Exhibit 60—that series of exhibits which I am going to discuss in just a moment—that enabled them to get the first 500 or so, they paid $22.50 for $40 fruit. The peel, forgetting about the peel and oil, was around $12-$14 a ton.

The plaintiff was supposed to compete with that kind of an arrangement.

Well, now, that brings us down, ladies and gentle-

men, [4463] to the question of damages in this case. I contend at this point that the evidence, and most of it, bear in mind, ladies and gentlemen, is undisputed, facts and figures or statistical information, these contracts, the written evidence speaks louder than the vocal word, the undisputed evidence shows here what happened. The effect on the plaintiff, I would say, is obvious.

We come to this question, then, that these agreements and this arrangement with TreeSweet, giving them the preference—the plaintiff didn't know about it in 1947 when it had difficulties, didn't even know about it until we got in this lawsuit, except it knew there must be some kind of arrangement which would enable TreeSweet and Silzle to process and sell at the same time—and the selling is the important thing, to keep their markets and their customers—this juice at $2.20 and $2.50 a case, when the $40 posted price of Sunkist for oranges stayed stable and remained at that level—didn't know what the details were, but that there was some kind of an arrangement, and it could only have been made, ladies and gentlemen, as a result of a combination and agreement and understanding and pursuant to which there was a quid pro quo where each party gave something to the other in consideration of which these agreements were entered into.

In the TreeSweet situation, TreeSweet got the [4464] oranges. They got the kind of deal any businessman would have paid at least a hundred or more thousand dollars to get. The contract was

worth much more than that for reasons we have already discussed.

Silale got in on the deal, perhaps through the back door, but there was an advantage to them, obviously, because they got fruit at the $14 price. If you want to consider the figures in the 60's series, it would show by computing out how it actually worked out in practice.

Now, coming down to the damages again, I am now going to discuss this angle of our case and then I am through.

I want to direct your attention, ladies and gentlemen, to Plaintiff's Exhibit 39 while you are in the jury room. That is the prospectus which was issued by Winckler & Smith in the early part of 1951 after they had secured the permission of the California Corporation Commissioner to make a public offering of stock for the purpose of acquiring the plant, exercising the option, you remember, when they had to buy it, and to secure additional working capital to expand their operations into the frozen food part of the citrus juice business. The record here is replete that that was the phase of the business that was developing rapidly. So the plaintiff in the early part of 1951 had secured permission from the State of California to make a public offering of its [4465] stock.

The story here is told very well, I think, in this prospectus, and if you will bear with me for a moment, I will read just part of it.

Mr. Strachan: I will have to object to reading that, your Honor. It is not admitted as evidence of

the facts it contains. It was admitted for the purpose of showing a permit to issue the stock. The truth of the facts contained therein was not admitted.

The Court: That was not discussed, but are you now relying on that?

Mr. Dixon: It is background. It is all in evidence here through other sources, as well as through Mr. Winckler's story of what happened.

The Court: The matters you are going to refer to are covered by other evidence?

Mr. Dixon: Yes, covered by the testimony of Mr. Winckler.

The Court: All right, then.

Mr. Dixon: "In 1946 the company originated a new citrus blend, trade-marked Citrus Cocktail, and due to an unusually heavy demand for this product, it was decided to pack an inventory. The decline of the citrus price during this year, which was occasioned by overproduction and dumping of war surplus citrus juices, caused very heavy inventory losses. [4466] This affected the entire industry. These losses were definitely of a non-recurring character."

That, of course, is his statement.

"Due to the fact that the corporation since 1946 has not packed large inventories and has established the policy of packing only against firm orders, this speculative feature of the business is now eliminated. This setback caused the corporation a loss on its inventory, plus the inability to pack juices while the surplus inventory was being sold. This loss

amounted to $519,155.55 and made it necessary to effect a reorganization in 1948 under the then existing law.

"Disregarding this non-recurring inventory loss"——

Mr. Strachan: I will have to object to this. This is not based on Winckler's testimony. This is just reading from the prospectus.

The Court: There is other evidence in the record. The objection is overruled.

Mr. Dixon: ——"which was absorbed by the corporation over a period of three years, the corporation auditors, Hodge & Company, reported the following profit figures from the business."

Now, that is what I was coming into, ladies and gentlemen, but before I get into it, I want you to see the difference between what happened to Winckler & Smith on inventory [4467] in 1947 and what happened to TreeSweet thereafter. They got the new deal, and the new arrangement whereby they couldn't possibly suffer any loss because of any drop in the market through inventory.

But the plaintiff, coming out of reorganization in 1949, starting anew to build up its business, to renew its activity, the record in this case insofar as the auditors of this corporation are concerned, Mr. Hodge of Hodge & Company, shows that in the year 1949, and these are in the 60 numbered exhibits, ladies and gentlemen, there was a profit, operating profit to Winckler & Smith, even in spite of this situation that they didn't know existed, this ability of TreeSweet to get this product under this

arrangement and selling it all this time at the price, Sunkist buying it at that price with this discount, but in spite of that, with the true American initiative, with free enterprise, he went ahead and redeveloped and established the business anew. [4468]

In other words, they weren't down, they weren't going to be counted out, ladies and gentlemen. They came back to make a fight, get their business and their markets back, and they had a profit the first year of $120,000 in its operation.

Then came 1950. That year, you know there was a drop in the amount of fruit that was available. There was, accordingly, less produced. And in that year there was still a profit of about $20,000 on their operations.

So that after they came out of this reorganization and started anew, even with a handicap, when they bought from Sunkist, of having to pay on the line—and they bought some fruit year after year, but it got less and less, because the testimony of Mr. Kelly is that they had to pay cash, they wouldn't sell them on any other basis, but they made purchases and they continued to stay in business, and they continued, ladies and gentlemen, to develop and increase their sales. There was an increase in the sales of over a quarter of a million dollars in 1950, as against the previous year, there was an expenditure in the years 1949 and '50 of new machinery and equipment in this plant; of approximately $100,000 and there was $50,000 paid off on the RFC loan or mortgage against the plant during this period of time. So headway was being made.

We come to the period of 1951. In 1950 arrangements had been made to go into the frozen juice end of the business, [4469] and efforts had been instituted, and permission had been granted by the State of California to raise additional operating capital under the free enterprise system, ladies and gentlemen, to further develop this business, get additional working capital, so we go into the 1951 season fully expecting, because it was known, Sunkist knew, and I think everybody knew, that '51 was going to be a good year, there was going to be plenty of Valencia oranges available—so the plaintiffs expected in this year that they would be able, really, to develop and expand their business. What happened?

You know the story. Comes the drop in the price. The $40 fruit remained stable. And during the year, the processing year, the plaintiff, which in two years before, when it came out of reorganization, had processed and sold approximately in excess of 18,000 tons of all citrus juice products—I mean of all citrus products, including oranges and grapefruit—in the year 1949, as you will see, and you know from the record, the production of citrus juices exceeded 80,000 tons by the plaintiff—in 1950 there was a contraction because of the two increases in price, and the policy of the plaintiff not to pack inventory, not to get caught as they did in 1946 and '47 with a high price of fruit, prices went up twice, Sunkist prices went up forty, forty-five, to fifty dollars in 1950, so they didn't pack so much, not so much fruit. In 1951 there was no shortage.

Plenty [4470] of fruit. The biggest year. So if the free enterprise system for availability of product fruit was to operate without prejudice and against independent processors, as Mr. Finley contended, and he testified he didn't want it to be anything else in 1951, if there was any concern about the independent processors in 1951 being able to continue to process and remain in business regardless of the price, to protect him against drop in prices, as Mr. Kelly testified, and as Mr. Finley testified was the purpose of some of these contracts, that operated, ladies and gentlemen, for everybody except the plaintiff, every independent processor in the business in 1951 of any consequence, certainly those that were processing into single-strength Valencia juice, they had access to the product in such manner and in such a way that they were able to continue to process and sell and keep their market in 1951, but it was under a condition, so far as TreeSweet, Silzle and Sunkist were concerned, of price restrictions, and the operation of the price controls that are brought out and were effective, which are clearly shown from the contracts and from the testimony of Mr. McMillan, that his sales prices were substantially the same as the Sunkist, and the testimony of Mr. Clark that they were substantially the same.

Now, we come to this question of what is the damage. We submit to you that this evidence that we have referred [4471] to, these contracts, clearly show existence of a violation of the antitrust laws, the combination and conspiracy here to restrain

trade in the sense that it will eliminate competition from the single-strength Valencia juice market, and to monopolize that market, to the extent that the product single-strength Valencia juice processed here in California shall be controlled here in California by Sunkist, it clearly establishes that.

We would not be here if Sunkist had processed that itself, or under proper processing contracts. That they have the right to do. But we believe as independent processors, and as competitors, not only of these independent processors Silzle and TreeSweet, and building up a label business—a label business, the Anagold label, which was built up through the years, and for which approximately $50,000 had been spent in sales promotion work in '49 and '50—that under those circumstances to give to independent processors, and to deny to the plaintiff, access to that kind of a deal, was to eliminate it as a competitor in this market. And that is exactly what happened, ladies and gentlemen.

Now, how did it happen? It happened because of these acts: The fixing of the price by Sunkist at $40, keeping it there, making it thus impossible for the plaintiff to have access to any Valencia oranges on any bases whereby it [4472] could secure them and process them into single-strength orange juice to compete in this market. That as a result of that, problems that you heard Mr. Winckler testify to in '51 occurred, in spite of the permission secured to get additional capital through stock. After some stock had been sold it was stopped because of the situation that was rapidly developing, when

the plaintiff saw that it couldn't get any oranges on a basis at which it could likely produce them and sell them that year. One thing led to another, and, of course, the windup was that with no product in 1951, which comprised over 75 per cent of the total volume of its business, it could not survive that situation. And the inability to get fruit and to process it and to sell it in interstate commerce on a basis which would be competitive with its own independent competitors, TreeSweet, Silzle, and the co-operative Sunkist.

That started the wheels going and rolling, ladies and gentlemen, and what happened, of course, was that in February of 1952 an effort was made to still maintain the stability of this company. Mr. Walker at that time, I believe it was either February or March, it probably was March, was appointed trustee to take over the assets of this company, and to preserve them in the interests of the creditors and stockholders, and to endeavor to work out some arrangement to make it possible to rehabilitate and reorganize and re-establish [4473] this business. It was too late, it was too late, ladies and gentlemen. Because this is a one-purpose plant. And if you or I as business men would inquire into this situation and have presented to us the evidence which you have had presented to you as jurors in this case, I submit that no sound business man would touch a proposition of this kind, because there would always be hanging over his head the sword of Damocles which could drop and eliminate him at any time, as it was done in this case.

Now, it is our contention, ladies and gentlemen, that if the plaintiff had had, not 24,000 tons, that Sunkist got, but just enough oranges to in a sense equal its capacity and its record for production in 1949, in other words, 12,800 tons that year were processed by this company into single-strength juice, half of the TreeSweet amount, just half of it, that it would have realized an operating profit, together with its other business, on a most conservative estimate, of at least $20,000.

I want to point this out, ladies and gentlemen, because it had no product to sell, and its overhead went on—in spite of that it lost in 1951 approximately $180,000. This profit of $20,000 that I am talking about takes into consideration, as Mr. Hodge testified, that it would be recouped, that is, the loss of $180,000 would be recouped, and [4474] that in addition thereto there would have been an actual operating profit for that year. So it is our contention that that is the first element of damage, which you can consider if you reach that point, and I am certain that you will in this case on the evidence, that that is the first element of damage, the $220,000 which is set forth in these 60 exhibits. I am going to discuss those briefly in a few moments.

Then there is, in addition to that, the loss of the $50,000 spent for sales promotion work in the years '49 and '50 that you heard about on new product. There is, of course, the $100,000 on new equipment. But let us consider, and it is for you to decide, ladies and gentlemen, what the value of this plant was. There are two appraisals here. One made in

1946, another made in 1950, preparatory to the securing of this permission to sell stock to expand operations and getting additional operating capital, and to purchase the plant of the plaintiff, back, which had theretofore been available to it under the option agreement, to exercise that option and actually restore itself to its operating capacity—I mean to reacquire its plant. Now, the inventory set forth in the appraisal shows the value placed on that property at that time as in excess of $600,000. That is the reproduction cost. Now, that is an appraisal made at the time, ladies and gentlemen, and before there [4475] was any question about this lawsuit. The same as the books and records of Mr. Hodge were made and kept before there was any question about whether this company would be engaged in any litigation of this character.

I well realize that a plant which has a single operating purpose, such as this, and that is what it is, of course, may have little value, it may have no value at all, if it is thrown on the market as it was in this case, because no one is going to buy a single-purpose plant, unless they want to go into the business that that plant is capable of organizing. But the reproduction cost, the basic cost referred to in the appraisal here is the amount suggested. In other words, anyone that wants to go into the business and have this equipment, that is what it would cost them to go out and get it.

That doesn't necessarily mean, of course, that that is dispositive of the value. That is for you ladies and gentlemen of the jury to decide and to

determine. But I submit to you that the chain of reaction was started here in 1951, which led to the ultimate sale by the trustee here of this property for $100, subject to the encumbrances against the plant, which at that time with taxes, and so forth, constituted an actual selling price of about $150,000 at that time.

Now, if you decide that the chain of causation here, [4476] I submit that that is what happened here when the plaintiff could not get the product to process in 1951, because of the abuse of the monopoly power by Sunkist, which it had, and it had a legal monopoly, we concede it, over the oranges available, but it abused that power by making them available to its competitors, and to the competitors of the plaintiff, in the manner in which it did in the TreeSweet contract for many years, and in the TreeSweet and Silzle contracts in 1951—that the inability to acquire the fruit is what started this situation to moving, ladies and gentlemen of the jury, to a point where it couldn't be stopped, in other words, once it was started the chain of causation continued, which ultimately resulted in the loss, complete loss of this business, with the damages that I mentioned.

Now, we have submitted to you, and it is in the record, a comparison here of our statements and the contentions of the defendants with reference to these operating profits, and balance sheets. They are all in the 60 exhibits. I am not going to take your time to go over them with you now. They will be with you in the jury room. But they show, as

far as the plaintiff is concerned, clear operating profits during the years 1949 and '50.

The defendants, however, contend that instead of having any operating profits, this company, they say, never operated at a profit. And with their auditor, or auditors, I should [4477] say, they came in with their exhibits, the "BD" exhibits, and in the "B" series there is a difference between Mr. Hodge and their auditor, Mr. Lynch, of $212,000, or more, insofar as the profit and loss statement of the plaintiff is concerned, in the year 1949. In the year 1950 there is a difference of over $55,000. I think you remember how some of those differences were accounted for, ladies and gentlemen.

This big difference of $212,000—and keep this in mind, I suggest, that Mr. Lynch, the defendants' auditor, was paid to come in here by the defendants, and it is not in dispute in this record—on cross-examination he admitted that up until December 1st of this year his firm had been paid the sum of $39,000, just to make an audit, to prepare this statement, ladies and gentlemen, of which $4,000, I believe he said, was for traveling expenses to and from Chicago. Now with that in mind, looking at the things after the fact, Mr. Lynch comes up with these astounding figures as a Certified Public Accountant.

Now, it is for you to decide, ladies and gentlemen, whose figures you are going to believe, and whether there is any bias on the part of Mr. Lynch by reason of the amount that he had been paid up to that time to make this audit, his firm, and to examine

these figures, or whether you are going to accept and believe the figures and the statements of [4478] Mr. Hodge, who was the auditor of this company at the time these statements were prepared and made for the years to which they relate.

I suggest to you that Mr. Lynch was clearly in error in endeavoring to inject into—he had to find some way to show that this plaintiff didn't operate at a profit at any time, and the only way he could do it was to bring in a paper loss on the plant and claim that the corporation sold it at a loss in 1949, and, therefore, that loss was part of its operating loss during that year. I think his Honor may instruct you that Mr. Lynch was in error in even endeavoring to make that kind of a computation, because the sale was made pursuant to the reorganization proceedings before this court, and subject only to the approval of the court as part of the reorganization plan. But, in addition to that, and to show the extent to which Mr. Lynch went out of his way to try to pin something on somebody to discredit them, and to discredit these books and the plaintiff corporation, you will remember he said that, I think, the president of this company had had $300, or $330 paid for rent, and a gas bill, I think, of some $28; and upon examination I asked him how and from what books of the company he got that information, and you may recall that he was finally forced to admit that as to the rental charge, which he wanted you to believe, by inference, ladies and gentlemen, was paid out [4479] of the funds of this corporation for the rent of the president of

the corporation—and the facts belie it—that it wasn't paid for rent at all. We had to explain on the stand what it did go for. The $28 gas bill was paid for the corporation, gas furnished it, when this company was trying to start up again in '49, in accordance with the free enterprise system of initiative on which our American economy is based and has prospered, not to be discouraged merely because you have had an inventory loss, but to get back in and keep up the efforts, get back in the fight and build up the business. That is what the plaintiff endeavored to do.

He didn't know the cards were stacked against him, ladies and gentlemen. But that is precisely what happened, and that is precisely what the situation was.

Had the plaintiff known the situation, they could have saved themselves many, many hours of hard work and labor, and many, many dollars that went into this business, when it was inevitable, with this kind of arrangement, the TreeSweet deal always coming year after year, high prices, low prices, or whatever they were, it was impossible eventually to succeed with that kind of competition confronting them.

So in closing, ladies and gentlemen of the jury, I thank you for your consideration and careful listening to this argument. This is an important case. This is important to this plaintiff, obviously, to the creditors and stockholders [4480] of this company. It is, of course, important to the defendants. But more than that, more than either the impor-

tance to the plaintiff or the defendants, is the importance to the country and to the public, that our free enterprise system, whereby venture capital goes in to build up a business, be protected against combinations such as the evidence shows existed here, which have the power, and which have exercised the power, to eliminate a competitor, to stabilize prices, and to control the market. That is what you have in this case, ladies and gentlemen of the jury, and that is the thing that to me is more important, and is more important to you as citizens, as members of our public, that if you find that what happened here—and I submit the evidence clearly shows that it was the cause of what happened—that if such you find, that the defendants have violated the antitrust laws here by unreasonably restraining trade and commerce by their acts, by eliminating competition, particularly the competition of the plaintiff, by what they did, and by refusing to make oranges available to it under any arrangement—that is the testimony of Mr. Finley, that he wouldn't give them any oranges under any arrangement, and Mr. Kelly only at $40—that under those circumstances, even though the plaintiff may have received some oranges from Ward, it was incidental, and Ward only had a very small part, relatively speaking, of the total production [4481] available—that under those circumstances the eliminating of a competitor, in this case was the competition of the plaintiff from this market, that as a result of these acts eliminated another individual company, sponsored and promoted through

private capital, from a field in which it had endeavored to develop a business in the spirit of our true American tradition, and our free enterprise system. [4482]

The cards were stacked against him, the combination prevailed, and another independent processor, and another independent businessman has suffered and been eliminated from our free economy.

So as you go to your jury room, ladies and gentlemen, after you have heard all the arguments in this case, I submit that as you consider the facts and the evidence here, you will conclude that the defendants have done the things charged here which constitute a violation of the antitrust laws, that the plaintiff has suffered damage as a proximate result of their conduct, the damage and the amount thereof being for you to determine.

I have endeavored to give you some facts and a guidepost from which you can determine that. I am confident, considering all the evidence, you will conclude that the plaintiff in this case is entitled to a verdict.

Thank you, very much. [4483]

* * *

(The following proceedings were had outside the hearing and presence of the jury.) [4485]

* * *

The Court: Whether you agree or not.

Now, do you have any instructions you want to talk about? Incidentally, I made some changes in R. If you have got the court's R in front of you, I will

show you what changes I made in it. Have you got it there?

Mr. Fowle: Yes.

The Court: On the instruction on lined paper, in the first paragraph, second sentence, it should be 84-A instead of 84.

Mr. Fisher: All right.

The Court: In the second paragraph, it would have to be changed to insert after the word "debtor," "from the time of the beginning of the proceedings under Chapter XI, and then go ahead with it.

These are immaterial matters, but to be accurate, they [4491] should be made.

"and Lynch was the receiver," insert "for Winckler & Smith from"—strike out the rest of that line, "and did extend thereafter and."

The next line, strike out "Chapter XI was filed," so it will read, "thereafter until approval."

Of course, actually he still had a certain capacity as receiver as far as settling accounts, but that is immaterial.

Then on line 21, "and Smith's property and business through its powers and," inserting "and from the date of the appointment of Lynch as receiver through its receiver."

In line 26, "whereas" should be "wherein."

Line 32, "December 14, 1948"—incidentally, I had December 14. My law clerk typed this and he looked at an order or something and put in February.

Mr. Irwin: I beg your pardon. I didn't get that.

The Court: "Whereas" is changed to "wherein."

"December 14, 1948," on line 42.

Mr. Irwin: Yes.

The Court: "To the date of the"—strike out "order." "Close of the escrow wherein the money was deposited."

On the next page, a portion of a word is stricken out. Line 16, I have changed "factory" to "plant."

Line 26, "factory" to "plant." [4492]

Line 32, "factory" to "plant."

Strike out "should," and say "referred to in the evidence."

Then on line 4, insert the word "expert" before the word "witness."

Strike out "was in error in so" and insert "for the defendants should not have so." Change "considering" to "considered."

Now, do you want to make any further record on your objections? All the objections you have heretofore made may be incorporated.

Mr. Fowle: I think that is satisfactory. I think Mr. Strachan made the objection to any reference to Lynch at all, that is to the witness Lynch, the expert witness.

The Court: Well, I softened it by putting the error on myself. [4493]

* * *

Mr. Fowle: Court's P, of which we have a new copy today. [4500]

The Court: It was just typed up. It is not changed. What about P?

Mr. Fowle: Perhaps we made our record on it. I simply wanted to renew the objection that that simply says, in my judgment, that Exchange Orange would have had a legal right to refuse a contract to plaintiff comparable to TreeSweet and Silzle, unless it did not have such a legal right.

The Court: That is just what the law is, I think.

Mr. Fowle: I submit to your Honor that that doesn't tell the jury what we think the jury should be told. I believe the jury should be told that they have a legal right to refuse such a contract, or they had such a right, if the action of Exchange Orange was their independent action and was not part of the conspiracy charged in this case. [4501]

The Court: As a matter of fact, this instruction is, then, more favorable to you than the one you propose, because here all the jury has to find is there was a right of refusal and it was part of a violation of the antitrust laws. Under your suggestion, the jury would have to find not only was it a part of the violation of the antitrust laws, but also it was made in the exercise of good business judgment, and then they could find it was a legal refusal. This doesn't even go as far as you propose.

I don't think it is error. It has one less element.

Mr. Fowle: You understand our position?

The Court: I understand. The objection is overruled.

Mr. Williams: We have one other objection on Q. Q is the one where they may find a violation of either Section 1 or Section 2, or both.

As long as it is the same conspiracy, they can't

find a violation of Section 2 standing alone. It either has to be a violation of Section 1 or a violation of Section 1 and Section 2. And the reason for that is that a conspiracy in violation of Section 2 is necessarily a restraint of trade and also violates Section 1. So they should be instructed that they cannot find a separate violation of Section 2, if they do not find a violation of Section 1.

The Court: What do you say to that?

Mr. Dixon: Well, I don't think I agree with counsel [4502] that a Section 2 violation, conspiracy to monopolize, would necessarily be a violation of Section 1, restraint of trade.

The Court: Isn't every monopoly in restraint of trade?

Mr. Dixon: Yes; but conspiracy to monopolize—that is probably restraint of trade, too. In other words, I am thinking of the National City Lines case, where the defendants were charged with conspiring to restrain trade and to monopolize. The jury did find that they violated Section 2, and they acquitted them of violating Section 1. The court of appeals affirmed, and the Supreme Court refused to admit for review.

The evidence was the same in both cases, I mean both charges. The contention on appeal, of the defendants, was that you couldn't have such a verdict, it was inconsistent, because if it was a violation of Section 1 it was a violation of Section 2.

The Court: And they found only Section 2?

Mr. Dixon: Yes. They found only Section 2, and acquitted on Section 1.

The Court: That is an identical situation to this?

Mr. Dixon: Yes. That is why I don't necessarily agree with the defendants.

The Court: I can't see the point, either, because it seems to me that every monopoly has to be automatically a restraint of trade. Therefore, a conspiracy to monopolize [4503] is a conspiracy to restrain trade by monopolizing.

Mr. Dixon: Well, a conspiracy to restrain trade may be affected through other means than by conspiracy to monopolize, and it is a question of fact sometimes whether it is one or the other.

The Court: Section 1 is much broader.

Mr. Dixon: Section 1——

The Court: But it is the impact on trade that makes monopoly illegal.

I am content with it, unless you see——

Mr. Dixon: I am content with it.

The Court: The objection is overruled.

Mr. Dixon: That charge would certainly be in line with the National City Lines decision.

The Court: All right. [4504]

* * *

Wednesday, February 8, 1956, 9:00 A.M.

The Court: Well, I found something more. Did you fellows find anything?

Mr. Dixon: I didn't find anything directly on the point, Judge. The only Supreme Court case, antitrust case, 282 U.S. 555, doesn't deal with the

question that we were discussing yesterday on proximate cause. It just leaves it proximate cause.

American Jurisprudence had some notes under Statutory Liability, and the causal application thereto. 52 A. J. 383; 50 A. J. 589.

"A person is not necessarily absolved from the consequences of his failure to perform a statutory duty because there was another efficient cause contributing to the injury."

That was about all that I could find in the search that I made.

There is another Court of Appeals case, 229 F. 77. But that, again, doesn't deal directly with the problem that you were raising.

The Court: Did the defendants find anything?

Mr. Fisher: We, of course, found this Storey Parchment [4506] Company case, that Mr. Dixon just referred to.

I checked the sections 279 and 280.

The Court: No cases?

Mr. Fisher: There was just one case I think in Kansas, a criminal case. It has been criticized by Professor Carpenter, now deceased, of the U.S.C. Law School, in 11 Southern California Law Review, page 425.

The Court: I found two or things more in the Restatement. I don't think it alters the principle that we found in 279 and 280, but in the fourth volume, which is Interference with Business Relations and Miscellaneous Torts and Defenses and Remedies, here are some general statements:

"870. Liability for Intended Consequences.

"A person who does any tortious act for the purpose of causing harm to another or to his things or to the pecuniary interests of another is liable to the other for such harm if it results, except where the harm results from an outside force, the risk of which is not increased by the defendant's act."

Then 915 on intended consequences:

"A person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it was expectable, except where the [4507] harm resulted from an outside force the risk of which was not increased by the defendant's act."

That last one seems to me—they are both very similar in principle, but I will tell you what I think the law is. I don't think we would agree basically what the law is, but in the case of intentional tort, each tort feasor would be liable for the entire harm, and each tort feasor would be liable for the harm that was, as 270 said, of the type intended, and as far as other forces were concerned, he would be still liable except where the risk of this outside force was not increased by the defendant's act. I think as a matter of logic that follows.

Take a simple case of assault on a patient that has a bad heart and he dies. I am liable even though the heart condition definitely contributed to his death. In other words, except where the harm resulted from an outside force, the risk of which was not increased by my act.

We could spell out situations where some outside force brought the result about and where it would

have happened, had not the actor's conduct or act been involved. Then, of course, I think that the actor is not a cause. What to do about it, I don't know.

Mr. Fowle: Your Honor, we looked over here in the County Bar Association Library at some length last night. Of course, time was not unlimited but, as your Honor knows, there are [4508] a great many cases in the antitrust field, treble damage cases, in which it is said that the injury must follow as the proximate result of the acts complained of, or vice versa, the acts complained of must be the proximate cause of the injury. I mean that language is used in opinions you have written yourself, referring to the Kar Seal case, for example. But in the time we had available, we couldn't find a single antitrust case, treble damage case, where there was the slightest hint in the opinion that proximate cause should be defined any differently than it is defined in the proposed instruction No. 12-A which is among the mimeographed instructions you submitted to us.

The Court: I started out with that, too, until I got to thinking about all those instructions, and they are in BAJI, and they are under the heading of negligent injury and they are, of course, slanted towards this question of an intervening or a superseding cause. That, of course, is the law of negligence. It is not the law of intentional injury. It is probably a point that hasn't come up very often, but when it does and they start to analyze it, I think they will have to analyze it from the standpoint of intentional injury.

Mr. Fowle: That I am not so sure about. I think that Sections 279 and 280 of the Restatement really don't deal with proximate cause. I mean they are dealing with causation and a field where you do have an intentional injury. Whether [4509] to here you have an intentional injury here or not could be a question of fact, as I think we have pointed out as we have gone along.

I saw one case in the antitrust field where they treat this whole thing as sui generis. They don't consider the precise problem your Honor is thinking about, whether this is in the field of a negligence type of tort or whether it is in the field of intentional torts. But it could be either one, I suppose, and it might well be a question of fact as to which it is.

From the opinion in the Kar Seal case the whole flavor and atmosphere of that opinion seems to me to suggest that in that case, at least, the court was not dealing with an intentional injury.

The Court: Of course, the point was never raised.

Mr. Fowle: No.

The Court: You write something and then you look at it in another light. I think all that was said there was that it must be the proximate cause.

Mr. Fowle: There was a good deal of discussion about the target area.

The Court: Yes.

Mr. Fowle: And whether or not the plaintiff happened to be within the target area and was hit.

The Court: Of course, that fits in with what I have [4510] been reading here on restatement. On

these intentional injuries, you find a lot which is not material to our case, but you find a lot of comment that if the intentional injury is directed against you and it hits Williams, there is causation, because it was an intentional injury, and the fact that it hit the person that he did not intend to hit, it is still involved. That would apply to this Kar Seal situation, whether he was shot at or hit. Of course, it is the same principle. Maybe the result isn't exactly the same thing. I don't know.

What about just some simple statement with something to the effect the liability for the injury of the type intended, which the wrongful acts, if any, were a substantial factor in bringing about?

I can't see how that would be error.

Mr. Walker: Don't you go further than intended and have to tie in necessary consequence?

The Court: When you say "injuries of the type intended"——

Mr. Walker: It seems to me it puts too much stress on the intent. The necessary consequence is an equal factor.

The Court: The defendant is liable for the natural consequences of his act.

Mr. Dixon: That's right.

The Court: I think we all agree on that. The natural consequences of his act. That is an old statement of causation. [4511]

"for injury of the type intended and injury that his act was a substantial factor in bringing about."

I haven't got my neck bowed on this, if somebody

comes up with something that looks all right, but I think we are in trouble if we start to take definitions of negligent causation, because I don't think anybody contends here that this is a case of negligent causation.

This talk about sui generis, if I understand what you mean, it may be that this is in a field by itself and that you can't take categories and lay one down against the other. That is what you mean, isn't it?

Mr. Fowle: That's right. As I say, I didn't have time to explore this. I would suppose someone could spend a lot of time on this point.

The Court: In view of that fact, why don't we try to pick some simple statement out that is broad enough to let either side argue the point and not try to pin ourselves down in making any law on this thing? Why not approach it that way?

Mr. Dixon: Necessary and probable result of the acts, I think certainly that is an ingredient of causation. Don't you think so? That is based upon the allegations, for example, in the complaint.

Mr. Fowle: Of course, the term proximate cause is used as a standard phrase in most of these treble damage cases [4512] where it comes up at all. We don't see why the definition that is given for proximate cause in this from 12-A, which you included in your mimeographed instructions doesn't define it adequately. [4513]

The Court: Here is what is wrong with it: "unbroken by any new or intervening cause."

I have been reading the comments in various sections of the Restatement on intentional injuries.

That, definitely, is a problem that comes in from the law of negligence, and not the law of intentional injury.

You see the term proximate cause used, and you have, also, legal cause, or direct cause. In the ordinary intentional injury where A hits B, you don't have a problem, because there it is the direct cause, it is the proximate cause, and you probably never even have an instruction on it; it is clear. But where you have a situation like we have, where the matter is not that direct, then you do have a causation problem, and I don't think it can be simply answered by saying that you can use these instructions.

Mr. Dixon: What was the number of that one, Judge? I don't seem to have it. Was that 12-A?

The Court: Here are the three of them that I pulled out. You can look them over.

Mr. Dixon: 12-A and 12-B might have application to this. I don't think 12-D has any application. They don't cover the precise point we have been talking about, either.

The Court: You say 12-A and 12-B. I think 12-D is out. That is joint tort feasors, anyhow, and we have an instruction on that. But what are you going to do about this "unbroken [4514] by any new or intervening cause"?

Here is what I wrote out:

"You have been instructed that for plaintiff to recover, its injury and damage must be proximately caused by defendant or defendant's wrongful act or conduct. A person is liable for all the natural and probable consequences of an act purposely done. A

defendant's act or conduct to create liability must be a substantial factor in causing the injury or damage."

Mr. Dixon: Of course, the word "purposely" there implies specific intent, to me. That is just the reaction of it.

It is correct, intent implies purpose, even under the antitrust law.

The Court: Here is what it says: The act is purposely done. It doesn't require that there be a specific intent that a certain injury result, but an act purposely done, then the person is liable for all the consequences of an act purposely done.

Mr. Dixon: I see your point.

The Court: I am not so sure, if you wanted to be technical about that, but that on intentional injury he is liable for more than the probable consequences of his act. I don't see that foreseeability enters into it. But I think for our purposes in trying to get over this hump, certainly there [4515] wouldn't be anything wrong with the first sentence.

The second sentence is: "A person is liable for all the natural and probable consequences of an act purposely done."

The next sentence: "A defendant's act or conduct to create liability must be a substantial factor in causing the injury or damage done."

Now, that is logical. If it wasn't a substantial factor——

Mr. Dixon: Then it couldn't be proximate cause.

The Court: Some minor thing, you could ignore that.

Conversely, of course, if there were other factors that entered into it, the defendant is still liable if his act was a substantial factor.

I don't think you disagree with that as a matter of law, do you? Supposing we could say there were three factors that brought about injury, if the defendant's act was a substantial factor, you still have liability. If his act was not a substantial factor, and the others were, you would have no liability.

Mr. Dixon: That makes sense to me.

It is as close as you can get, I think.

The Court: It is very general, but it skips some of the gutters here.

Mr. Fowle: Could I see that language, please?

(Paper handed to counsel by the [4516] court.)

The Court: You see, on 12-B the law does not seek and recognize only one factor—I am paraphrasing—to the contrary the acts—or "omissions" would have to come out—the acts of two or more persons—here we are not talking about persons' acts—you can say two or more forces may work concurrently as the efficient cause of an injury, and in such a case each of the acts or forces is regarded in law as a proximate cause.

Mr. Dixon: What you said is an improvement on that.

The Court: 12-B would have to be revised.

Mr. Dixon: I think the statement that you made in this other suggestion is equally as good.

Mr. Walker: I think it is better. This other would be too confusing.

Mr. Irwin: It is much better than 12-B.

Mr. Fowle: If the court please, I think the defendants would feel compelled to object to this.

I don't know just what "substantial factor" means.

In our view, defendant's act or conduct to create liability must have been the proximate cause of the injury or damage, and we think that the standard definition of "proximate cause," whether it be the one set forth in 12-A, or whether it be the one that is found in numerous other places, adequate definitions can be picked out from Corpus Juris and from American Jurisprudence, and from many places—and we think that the instruction should read that way. [4517]

Mr. Dixon: Which way, counsel?

Mr. Fowle: In the terms of the normal usual definition of proximate cause.

Mr. Dixon: What is it? What definition are you urging for the normal and usual?

Mr. Fowle: I think that form 12-A is adequate.

Mr. Dixon: Standing alone?

Mr. Fowle: Yes.

Mr. Dixon: In other words, you want a definition based on 12-A alone and nothing else, is that your position?

Mr. Fowle: What else do you propose to add to it?

Mr. Dixon: We are talking about A and B together, or the one that has been proposed by the court. You object, as I understand it, to the one that the court has proposed, and you want A alone. Is

that your position? I mean 12-A alone. I just want to get the record clear as to your position as to what you want, and also what you are objecting to.

Mr. Fowle: I think I have made it clear what I am objecting to. 12-B of the court's form instructions would perhaps be all right.

Mr. Dixon: Coupled with 12-A? What I am trying to get, counsel, is what your position is with reference to either one of them or both of these plus the one proposed by the court.

Mr. Fowle: Well, I have one little difficulty with 12-B. [4518] It seems to me there is a word left out in the second line.

The Court: Well, there is the 12-B. I have cut out "omissions."

Mr. Fowle: I think the 12-A and 12-B as it has been changed by the court would be satisfactory.

The Court: Show Mr. Dixon that 12-B. The only thing in 12-A that bothers me is this "new or intervening cause."

Mr. Walker: Can that be stricken?

The Court: If you want to strike the "new or intervening cause," I will give 12-A and 12-B. Look at 12-A there with that change. I would give 12-A along with 12-B.

Mr. Irwin: I don't see anything wrong with that.

The Court: Or here is another suggestion (indicating). That makes more sense. Let me read it here so we know what we are talking about. You took 12-A and said:

"The proximate cause of injury is that cause which operating in normal and continuous sequence unbroken by some new act or force which becomes

the sole cause produces the injury without which the result would not have occurred."

Mr. Fowle: Well, that become a definition, it seems to me, of something other than proximate cause.

The Court: That is actually what this new and intervening cause means, because the word intervening cause by itself, [4519] using the language of the law of restatement, doesn't mean anything. The intervening cause can break causation or the intervening cannot. If it breaks causation, it is technically called the superseding cause, a cause which supersedes, so that then logically fits in with the revision we made of 12-B.

Mr. Dixon: Yes.

The Court: Which uses acts or forces, and so forth.

Mr. Fowle: Well, I gather 12-B simply says in effect that there can be more than one efficient cause, to use the phrase that is in 12-A, and 12-B says there may be two efficient causes.

The Court: That's right. But if another cause comes along which supersedes, as it were, and becomes the sole cause, then all the other causes go out the window. That is the law of causation certainly in negligent injury, and it would probably be the law in intentional injury. If another cause comes along which supersedes and becomes the sole cause, something like that, unbroken by another cause which supersedes and becomes itself the sole cause.

Let me see that again.

12-A as I now have it reads:

"The proximate cause of an injury is that cause which operating in a natural and continuous sequence unbroken by some new and superseding [4520] cause, act or force, which in itself becomes the sole cause, produces the injury."

I don't know whether that in itself adds anything. It doesn't hurt.

"This does not mean that the law seeks and requires only one proximate cause of the injury, consisting of only one factor, one act, one element of circumstance or of the conduct of only one person. To the contrary, two or more acts or forces may work concurrently as the efficient cause of an injury, and in such case each of the participating acts or forces is regarded in law as a proximate cause."

I think I am content with 12-A and 12-B. If you don't like the other thing I suggested, the other alternative, the one I wrote out, I am content with this.

Is the plaintiff satisfied with 12-A and 12-B?

Mr. Dixon: Mr. Irwin just adds a comment here. He suggests the word "other" be substituted for the word "new."

The Court: That's all right. All right. I propose to give 12-A and 12-B and you can make your record on it. That is 12-A and 12-B as read.

Mr. Fowle: We object to the modification of 12-A for the reason that we think the insertion does not truly state the law.

The Court: All right. 12-B? [4521]

Mr. Fowle: We would have no objection to 12-B if it were used with 12-A as originally drafted, but

I think we would object to 12-B in combination with 12-A, 12-A having been changed in a way we object to.

The Court: Overruled. Actually, as far as 12-A is concerned, we haven't destroyed the effect of it. We have substituted for the words "new or intervening cause" the words, "some other and superseding cause, act or force which in itself becomes the sole cause."

I will give 12-A and 12-B in the form in which they have been read.

* * *

Mr. Dixon: You have added to the statute, Judge, have you, the language of the statute there?

The Court: No.

Mr. Dixon: The unreasonable restraint?

The Court: That would be the court's instruction on the statute. I can find it in a minute. It is I or J. Section 1?

Mr. Dixon: Section 1, Judge.

The Court: What would you add to that? [4522] "The restraint of trade or commerce must be an unreasonable restraint."

Mr. Dixon: Yes.

The Court: I had better make this clear that this isn't the statute. "The law holds that the"——

Mr. Dixon: "Restraint referred to in the statute."

The Court: ——"must be an unreasonable restraint." Is that satisfactory?

Mr. Fowle: Would you mind reading that? I

got a little mixed up. "The law holds that the restraint"——

The Court: "——the restraint referred to in the statute must be an unreasonable restraint."

I would add that to Court's I, which is Section 1 of the Sherman Act.

Is that a correct statement of the law?

Mr. Williams: I think it is a correct statement as far as it goes, your Honor, but it leaves hanging in the air any indication of what is reasonable and what is unreasonable. The cases often say every contract, many acts are restraints of trade, but it is only those that are not the normal business relationships.

Mr. Dixon: I don't think you can go into that definition in this kind of a case. [4523]

The Court: All right. I will add that to Section 1. Objection overruled. [4524]

* * *

ARGUMENT AND SUMMATION ON BEHALF OF DEFENDANTS

Mr. Strachan: May it please the court, Mr. Dixon, ladies and gentlemen of the jury. It is now my duty to deliver what is called a summation. I wouldn't call it an argument. It will be a review of what the issues are as the defendants see it, and what the proof has been according to the defendants' point of view.

I want to say, before I begin, that perhaps my voice won't register at times. If it doesn't, I would

appreciate it very much, if any of you are having trouble hearing me, if you would just give me a little sign.

Can you hear me now?

A Juror: I can hear you all right.

Mr. Strachan: Good.

This is a civil action in which the plaintiff seeks to recover money damages. However, the basis of the plaintiff's claim is that the Sunkist group—and when I say "Sunkist" in this argument, I refer to all of its components—the Sunkist group was a party, perhaps with others, to two criminal conspiracies. That the Sunkist group deliberately and for the purpose of injuring the Winckler-Smith Company entered into two conspiracies. The first of which it is said was a conspiracy to restrain trade and commerce in orange products. The second, a related criminal conspiracy, they say, was to monopolize trade in citrus products, particularly [4525] single-strength juice, and for the purpose of eliminating Winckler-Smith Company from the area of competition.

Sunkist is defending this case on the theory that those charges of criminal misconduct against them are utterly false. Throughout the long history of this famous co-operative, all of its activities, from the harvesting, from the sorting, to the selling, to the processing, to the selling of products, throughout the entire history these activities have not been directed toward restraining trade or monopolizing. The fact is just the contrary.

The effort has always been made to promote the

distribution, not to restrain the distribution of citrus fruit products. And that is the only object that this co-operative could have had if it was to serve the farmers, who are its members, honestly, and effectively and in their best interests.

The evidence further shows, ladies and gentlemen, that there has never been a purpose to monopolize the handling of the fruit, or its processing. Quite the contrary.

You have heard testimony that from the time that independent processors first appeared in the industry it has been the policy and the practice to share the processing of fruit with those independents. And the reason for that sharing was explained, and it should be very obvious. The fruit growers are growers; they are not manufacturers. They need to have manufacturing facilities, they need to have [4526] selling facilities available to them. But manufacturing facilities to handle the whole crop in a big year, and selling facilities, are costly, and it would not be, in the long run, to the interest of the growers to have to make the investment that manufacturing facilities and sales organizations require. So the growers, through the co-operative, have always depended on assistance from the independents, and have encouraged and fostered their growth.

Now, believing, as they do, that the plaintiff's claims cannot be established, the defendants have presented their proof in what might be called three different branches or areas.

First, is a showing by the defendants as to how they have conducted their business. That they con-

ducted it honestly, and what is now claimed to be wrongful, had honest and reasonable motivation, and was not a dishonest act.

Second, the second branch of the case is this: We have undertaken to show with the proof why it is that the Winckler-Smith Company failed as an independent processor in the citrus industry. And, briefly stated, the proof which we have presented shows various reasons for the failure. And, of course, everybody feels sorry for a person whose business has failed, but nonetheless these were the reasons for failure:

Mr. Winckler went into this business with no prior experience in American business, and no prior experience in the [4527] citrus fruit industry.

Next, he never had enough financial backing. He never had enough investment in the business to keep it going.

And, furthermore, on the financial side, his practices were not sound.

In addition to that, there were economic forces beyond the control of Sunkist, beyond the control of anyone, that resulted in his failure.

One of those resulted from the domination of the citrus market by the crop and packing conditions in Florida.

We had a terrible impact of that economic threat to the California industry in the year of 1951, during which the Winckler-Smith Company came to its end.

Another was that there was a radical change in

the citrus fruit processing industry, under way from 1948 to 1951, through the development of the frozen concentrate process of packing. That superseded and obsoleted largely the packing of single-strength orange juice.

Another difficulty was that he had trouble with the quality of his products.

Another was that he didn't enjoy the confidence and the good will of the people with whom he did business.

And another very important reason was this: That in 1951 he lost his regular supply of oranges when Morgan Ward entered into a contract with Case-Swayne for a participation [4528] arrangement for the packing of single-strength juice and declined to give Mr. Winckler's company such a participating contract.

Now, the third question in the case is damages.

As to damages, our proof shows, and I will go into it more fully, that this plant had no value, that it had been borrowed against and encumbered up to its full value. It was, as Mr. Winckler said, a hotel where you couldn't rent rooms.

Until he said that I would have compared it with a buggy whip factory. It was a factory that had no economic purpose. It had no profits, so we say that there was no damage, and there was certainly no responsibility on the part of the Sunkist group for Mr. Winckler having gone out of the citrus business.

Before I get into some of the matters that I outlined, I want to mention this: You will recall that Mr. Hodge was asked whether he had an opinion

as to why in the first six months of the fiscal year, beginning February 1, 1951, the Winckler-Smith Company lost money, $152,000 they lost before the Valencia season started, before any impact could have been felt by the company from what they now claim was done against them. He was also asked if he had an opinion as to why in that final year there was a total loss of $184,000.

He said, yes, he had an opinion, it was perfectly obvious [4529] that there was a decrease of approximately $500,000 worth of sales in the California operation as compared with the year before. [4530]

Now, that sounds plausible. But, ladies and gentlemen of the jury, when you get in the jury room you will have an exhibit to show that is not and cannot be the fact. I have here the Defendants' BP. That is an exhibit which shows for each of the three years following the Chapter XI proceeding, and the three years immediately preceding the Chapter X proceeding, the purchases of fruit, and here is what it shows.

It shows that in the first year, that is the crop year of 1949, the Winckler-Smith plant processed a little over 12,000—well, quite a bit over, 12,700 tons of oranges.

The next year its production dropped to 8,000, and in the next year, the last year before the Chapter X, it made a further drop, but not so great, to 5,000.

That exhibit will also show, and you can figure it right out from the face of the exhibit, that 63 per cent of the decline in tonnage of fruit processed by

the Winckler-Smith plant in the fiscal year, 63 per cent of the decline in that year was due to navel oranges, grapefruit and lemon products. The great decline, I say, was not in the Valencia oranges at all.

Coming now to Mr. Hodge's computation, you will find this Exhibit BO, which is entitled Sales of All Products, Excluding Florida Operations, and here is what it shows. It does not show, ladies and gentlemen, that the loss, the [4531] half million dollar loss of Valencia sales was responsible for what happened. It shows this, to the contrary. It shows that the biggest losses, comparing one year with the other, were these: Orange juice, navel—you will remember he packed quite a lot of navel juice, and that dropped 200,000 to 67; orange concentrate dropped from 278 to 155; grapefruit juice dropped from 225,000 to 92,000; and blended juice dropped from 176,000 to 51,000.

So the result of all this is that, excluding from consideration any decline in the Valencia orange juice, the decline in the other products alone was 743,000. Mr. Hodge simply cannot be right.

Another thing that you will see when you examine Exhibit BO is this. You will recall that in his argument Mr. Dixon said about 75 per cent of the Winckler-Smith business was in single-strength orange juice. That happens not to be borne out by the figures. The first year after the Chapter XI proceeding, the Valencia juice accounted for $832,000 in sales. You find that figure right here. In the next year, the crop year 1950, it was only 336,000.

But now we get to the other classes of products. Oh, in the first year, 58 per cent of the production was Valencia juice, but in the second year, that is the crop year of 1950, which was the base of Mr. Dixon's computation as to what happened and the base of Mr. Hodge's computation as to [4532] what happened between the 1950 and 1951 crop year, in the base year, the Valencia juice represented only 22 per cent of the total sales of Winckler-Smith. Other products, navel orange juice, orange concentrate, grapefruit juice, and the others, accounted for 67 per cent of the sales in that year.

Now, taking those figures and considering what they mean, it seems to me perfectly clear that the cause of the enormous drop that occurred between the first and the second year of operation, what Mr. Dixon called the chain reaction of causation had started in. Mr. Winckler's business was failing. It was failing seriously from the first to the second year, and in the third year the failure was completed, by causes which were quite unrelated to the supply of Valencia oranges.

There were other reasons why they had this big loss in the first six months of the year 1951. One of them you may remember was this. Mr. Winckler testified that it was not the practice of his company to pack for inventory, but he did something that was just as bad when he packed these ades. You remember he had orangeade, single strength, ready to drink, and he had lemonade ready to drink, and he had some concentrate, and he packed a lot of that

material. That was in the summer of 1950. It didn't go very well.

During the fall great effort was made to move these [4533] inventories, these stocks that were consigned in warehouses throughout the country, by reducing the price. That didn't work.

In November a bulletin was sent out, "Stop offering the merchandise. Pay the storage charges on it and hold it over to next year."

Well, they tried to sell it in the summer of 1951. Mr. O'Hanlon testified that the first assignment he was given when he was re-employed was to try to move those ades, and they reduced price and reduced price and finally, according to Mr. O'Hanlon, they sold them out at 60 or 65 cents on the dollar of the original price.

And in August, 1951, you will find he was writing a letter, which is identified in this record as Exhibit W:

"We have taken a severe whipping disposing of this inventory when you consider the manufacturing cost of this merchandise, plus the shipping charges and the storage charges, plus brokerage and selling cost. You can see how we came out on the deal."

That was another thing, another business mistake that contributed to the result in the first seven months and the full year that followed.

There was another matter. That was the Florida operations. You remember that exhibit on fruit purchases, the sales of product that I mentioned, excluded his Florida operations. [4534] In October of

1950, the Florida office was opened up, and Mr. Winckler testified:

"We tried to do the same thing that our competitor TreeSweet did. They moved down to Florida and leased a plant, and we wanted to be able to supply merchandise to people who are close to Florida, so that we can compete with TreeSweet. They closed the office in July of 1951.

"Q. Was that because of the chaotic conditions of the Florida market?

"A. Well, probably I wrote that in one letter, but the real reason was it was just like speculating on the stock market. It was very hazardous business. There was no logic in it and it was wild speculation."

And that speculation, you will find by referring to Exhibit BD, that wild speculation in the year 1951, the fiscal year ended with January, 1952, cost Winckler-Smith $10,300. Another mistake of management.

Still there was another factor you must remember about that fiscal year. You will recall that when he was making year-end adjustments to the books, Mr. Hodge reclassified some selling expense and some unabsorbed factory overhead that had been charged as expense during the year, but he threw that over, he called it an asset and threw it over as an asset in the next year to be written off. It was promotional [4535] expense, unabsorbed factory overhead, which means loss on inventory, and that sort of thing. But to the extent of $50,000, that is included in the loss of $184,000 for the final year,

and it is also included in the loss of one hundred fifty some for the first seven months of that fiscal year.

Now, I want to talk with you a little bit about the manner in which computations of profits were made. You will recall that Mr. Hodge's testimony as to what profits he would have made had fruit been available was based on the assumption the fruit which would have been available should have been available under the TreeSweet contract, and he assumed there would be 12,000 tons processed. Nobody has explained where the Orange Products Company or Sunkist would have got that fruit. The fact is single-strength juice was unprofitable in relation to the utilization of oranges in frozen, which was in great demand. Should they have taken it away from Silzle? Should they have take it away from TreeSweet? Should they have taken it away from the more profitable frozen? Nobody has ever answered that question.

But to get on with the matter of how he computed the profits, he took the TreeSweet contract, not the Silzle contract. He told you under cross-examination why he didn't.

"When you elected to make the computation under the TreeSweet contract rather than the Silzle contract, [4536] you made that computation on the basis of the contract that had the higher Sunkist sales price, is that correct?

"A. Yes, that is correct.

"Q. And also in electing to make your computation under the TreeSweet contract, rather than the

Silzle contract, you chose the TreeSweet contract which had higher allowances than the Silzle contract? A. Yes, that is correct.

"Q. Do you know whether Winckler-Smith business is more nearly comparable to TreeSweet or Silzle with respect to volume of operations, cost of sales, character of market, and so forth?

"A. No."

A little later I will show you that there was absolutely no comparability between Winckler & Smith and TreeSweet.

Now, one glaring defect in this computation of profits seems to me to be this. You will recall that the exhibits that Hodge put in on the Silzle and on the TreeSweet contracts showed how much was the cost of fruit, how much was returned for oil and peel, two different groups. Before the exhibit was admitted, his Honor insisted that those two elements be combined, and when his Honor questioned the witness to find out whether they should or should not be [4537] combined, this is what the witness said.

"Well, they paid so much for the fruit and they also gave them the peel and oil, so you have to take the two together to see what was actually paid for the fruit itself."

Again the court said,

"With respect to the TreeSweet contract, so there should be added then for the purpose of comparison the $10.81 at the bottom of page 2 to the $14.29.

"A. Yes, sir."

Now, for the purpose of comparison that should

be done but it was not done in the computation of the profits by Hodge. Hodge assumed that Winckler would have got the juice portion of the oranges without regard to the fact that TreeSweet was paying $10.81 more than that, so the computation was based on the assumption that Winckler would have had to buy and pay for only the juice and not the whole orange, which is contrary to what TreeSweet was doing, and contrary to what Silzle was doing.

So on that one omission alone, the computation inflates the profits as Hodge computed them by $130,000.

Now, there are other defects and they were admitted defects in the Hodge computation. One was that he, saying that the 1949 season was the true Valencia year, used 1949 [4538] costs. They, of course, did not reflect the inflation that went with Korea.

Mr. Regan followed Mr. Hodge on the stand. He testified as to what the actual cost, according to the books, records and cost analysis of Winckler-Smith Company were in the year 1951. With respect to cans, cartons and labels alone, there had been an increase of $5.50. [4539]

So there we have another error of $66,000, an understatement of the costs by $66,000, and a consequent overstatement of the computed profit.

And I said Regan followed Hodge on the stand and gave that testimony, but, ladies and gentlemen, Hodge followed Regan again, and he did not say one word in criticism of that.

It was unrefutable evidence and Hodge didn't try to refute it.

He did make one comment that I remember on Regan. He said Regan in adjusting the Hodge estimate had included an item of $2.40 for other ingredients, and Hodge said, "Of course, there are no other ingredients in single-strength juice."

But be that as it may, Hodge did not tell you ladies and gentlemen the fact, and the fact does appear in the record, that the costs be used for 1949 also included the other ingredients. And the only difference between Mr. Hodge's figures, so far as other ingredients are concerned, and Mr. Regan's computation, is the difference between the 1949 level and the 1951 level. If it was improper to put the other ingredients in Regan's computation, he did it because Hodge had indulged in that same impropriety. And I don't think it was an impropr ety.

Another defect in the Hodge computation was that he assumed that there would be no added selling or administrative [4540] expenses attendant upon handling this additional 12,000 tons.

Bear in mind this, ladies and gentlemen: If that 12,000 tons—mythical tons, as one of you called it, I believe—had been processed, the total processing of Valencia oranges in the Winckler-Smith plant would have exceeded the highest volume that had ever been processed by, I believe, some 5,000 tons, and would have been about equal to the maximum production on all types, navel, grapefruit, everything else, that he ever handled.

Well, the assumption that there would be no selling costs is one that is hard to accept. And Mr.

Regan didn't accept it. I think Mr. Regan qualified well as an accountant specializing in cost analysis. He has had government experience, and he has had private experience in that particular field. He came up with a computation of costs, including selling expense, and that computation agreed very well with Mr. Winckler's own testimony.

Hodge admitted that there would be some changes, but he had never figured it out.

Well, there was something, it seemed to me, terribly wrong about the Hodge computation.

You will remember when he first brought in his Exhibit 69, which was revised and re-revised, and you will see it in the final form, it said down at the bottom, "Profit on processing 12,000 additional tons, $25,000." [4541]

Well, that would have been what?—four or five per cent profit on a total of $750,000 of sales.

And that might not have been too far out of line, although as Regan's figures would show, built up step by step from the books, there would have been a loss on any quantity that he processed, a loss on every ton.

Well, at the end of about two days I finally realized—and I didn't realize it until the revised 69 came in—that instead of subtracting the $25,000 profit from the $184,000 loss, Hodge added the two together, and then I realized for the first time—you may have realized it before I did—that he had come to the conclusion through his mathematics that there would be a total profit of $210,000 on this one transaction.

That means something over 30 per cent, doesn't it, on a $750,000 turnover.

That is something unheard of in the citrus industry. Something the growers should have heard about if they were going to give people astonishing profits like that.

But here is how we tested the thing out. I took Mr. Hodge over, step by step, what his computation resulted in. There would be $210,000 loss that you would have to absorb. In order to do that, you would have to spend $485,000—no. $210,000, $184,000 loss, $25,000 of profit. You have got to absorb that. In order to do that, you had to have manufacturing [4542] costs, hard costs, they were called, of thirty some dollars a ton, $408,000, then you had to add to that the $170,000, which under the TreeSweet contract would have been paid for the juice alone, and not for the whole fruit, and then you add to that $22,500 for brokerage, then you also add, because Hodge added it himself, $37,296 for administrative and general expense, and when he got all through he came to about $850,000 that would have to be realized from the proceeds of the 12,000 tons.

That is, you would have had to realize something like $75 a ton. And on a per case basis, in order to get that result, Mr. Hodge admitted that you would have to sell the juice for something over $3.00. And juice, as you remember, was then selling at $2.50 and down to $2.20 a case.

I say that Mr. Hodge, had he found any error whatever in that computation which he made on the

stand, could have recanted, because he was back here again.

He didn't recant, and it stands on his testimony that in order to reach the result that his over-all figures give, you would have to sell juice at over $3.00 a case on a market that was nowhere near that high.

Mr. Winckler talked about costs. He said he had $1.35 a case as his hard cost. Then he said in addition to that an unconditional expense as the expense of sales, which includes brokerage, cash discount, and the expense of our own [4543] sales department. Having given you those figures, Mr. Winckler went through a computation, assuming that he would have to pay $44 a ton for his products oranges, and when he got all through, he came out with a conclusion that it would have been impossible, because he would have had to sell at $3.53 per case, on a market that was one dollar or one dollar and a half lower than that.

Now, let me tell you what you can do when you get into the jury room with that computation. Instead of inserting there the cost of juice, $44 a ton, which he worked out as $1.90 for the juice cost a case, just use, instead, the price that was paid by TreeSweet, $25.10, and here is what you will find: You will get the cost of juice at one dollar nine, and you add that one dollar nine to the one dollar thirty-five of hard costs, and you have a cost before selling expense or profit of $2.44. If you decide to sell juice with no profit at all, and add just the 8 per cent to the $2.44, you get a cost of production,

plus the cost of sales, without any profit at all, of $2.63.

That, of course, is quite a different price from the one that Hodge computed.

I say from that, that it is impossible to conclude on the basis of the evidence that is before you, that there would have been a cent profit on any quantity of oranges that might have been obtained on the terms of the TreeSweet contract. [4544]

Now, I want to talk a little about the profit and loss history of this company. Mr. Hodge talked at great length, Mr. Lynch talked at great length, about what should and should not be included in the income accounts for a given year.

Basically, the differences between these accountants were these:

First, whether the income account should be set up to reflect the transactions during the period in which they occurred. For example, the forgiveness of $38,000 of indebtedness by the corporation to Mr. Winckler, that occurred in June of 1949. Shortly after the business was resumed following the termination of the Chapter XI arrangement. What Mr. Hodge had done there was to put that back as if it had happened over six months before that. He threw it back into the prior year. Lynch and Regan didn't agree with that, but that is what Hodge did. That was one of the adjustments he made.

Another adjustment they made in that same year had to do with the loss of $169,000 on the sale of the assets, fixed assets. There is no question but what the loss was sustained, the amount of it was deter-

mined by Hodge. His report showed that the transaction was completed in April. And on that basis Lynch and Regan put the loss into the year when the records show it was sustained. [4545]

Now, Mr. Dixon told you that the court will give you an instruction, based upon his analysis of the bankruptcy proceedings, and will instruct you that it was not proper to reflect that as a corporate expense for the year. He will tell you in his instructions that the transaction originated in a plan of arrangement that was filed sometime in February of 1949, and that it was improper and it was part of the reorganization expense.

But be that as it may, it still does not justify Mr. Hodge in doing what he did, because he didn't record it as reorganization expense having occurred in the fiscal year of 1950. He put it back a year ahead of the time.

That is one of the differences between the accountants.

The other is whether it was proper to treat a prepaid bonus to Mr. Winckler—a bonus paid to Mr. Winckler in one year as being prepaid compensation for the next year in carrying it over to the next year. It was also a question of whether you could defer expense, treat it as an asset and put it over to another year.

Hodge reflected the transactions one way. Lynch had a preference for recording them in the year in which they occurred, without reclassification.

There is no question but what Mr. Hodge, by deferring expense, by setting it up as an asset in one

year and carrying it over to the next, was able to make the books show a [4546] $40,000 profit, instead of a loss.

Lynch adjusted to show the loss instead of the profit.

But quite apart from the bookkeeping that is involved here, the stubborn fact remains that however you throw these losses into one year, or into another, whether you call them operating losses, or whether you call them abnormal losses, they are still losses of the business, and the stubborn fact remains, as you will remember, when you examine defendants' Exhibit BF, an analysis of the surplus account of Winckler-Smith Company is all read, except for two items of credit to the surplus account. And those two items of credit are these: A credit for the $205,000 of debt that was wiped out in the course of the Chapter XI proceedings, and the $439,000 of credit that resulted from the appraisal write-up, after the plant was bought back from Rubin and Parvin. Those are the only two items of credit in that whole surplus account for the entire period.

That, ladies and gentlemen, is the basic fact. The reason no income tax was paid is that there never was income from this business. And even though the books might be made to show an operating profit, or some other kind of a profit, the total result of the entire business was loss, loss, loss; and that was not due to anything that the defendants did or failed to do.

Now, I want to talk about the claimed loss and the [4547] fixed assets.

Mr. Dixon in addressing you yesterday, I believe, asked for something like $750,000 loss on the sale of this plant. It was a very large sum. The truth of the matter is that the evidence shows that there was no such loss, that the plant had no economic or real value over and above what had been loaned on it.

You will recall that it was in 1951 when the company was about to reacquire the plant and was about to offer stock to the public, that they paid Mr. Rubin and Mr. Parvin $17,000 in cash, and the balance to make $150,000 preferred stock. Now, the value of this same plant when it was sold to Rubin and Parvin had been carried, as I recall it, at around three hundred or four thousand, but that was an inflated value. But when they bring it back onto the books they write the plant up, and here is what Hodge said about that:

"The valuation which I wrote into the books for those fixed assets was an appraised value based upon an appraisal dated January 12, 1951. The appraisal is $732,000, the write-up was approximately $442,000, and the capital and surplus was increased by that amount."

Then he was asked, "If a corporation has by writing up an assigned value of its assets on its books, simply changing an assigned value on the books as between yesterday and today, [4548] it would change the book value, would it not, of the stock?

"A. It certainly would."

"But it would not change the actual value of the stock?

"No, it would not change the actual value."

Mr. Hodge was asked whether he had at the time he put that write-up on the books an opinion as to whether the appraisal actually reflected the real value of the assets, and he said he did not have any opinion on that subject. [4549]

Then we had Mr. Brown here. He was the man who made the appraisal. He made the appraisal in —well, he made the appraisal on which the original price of $150,000 was based. Of course, that was written off when they took the loss. He came back and made another appraisal in 1950. Then he brought that down to date in January of 1951.

He said he didn't know at the time the 1946 appraisal was made that the assets he appraised at $368,000 had cost the company only $127,000.

As to the 1950 appraisal, he said that he went about finding what was sound value. He said it represents cost of the building.

He was asked, "Do you mean that indicates that the plant and building actually cost that much?

"No, it doesn't mean that. That is what it would have cost to replace them as of the date of the appraisal."

Did he take into account whether a prudent man, a reasonable man, at the date of the appraisal would have seen fit to replace those facilities?

He said, no, he didn't. He wasn't asked to give an economic or commercial appraisal. He had no idea, he said, what the plant was worth as of the

date of the appraisal in the economic sense. All he knew was an engineering determination of how much it would cost to replace that plant as it [4550] stood if you did it as of that date.

Well, that, ladies and gentlemen, has no bearing on the value of that plant. It is like a hotel without any rooms in it. Would you build a hotel like that?

No.

Would you build a single-strength orange juice plant in 1951?

No.

Then I asked Mr. Brown whether he was told what the purpose of the appraisal was, whether it was for the purpose of supporting the offering of stock to the public.

He said no, he did not tell him that. "As a matter of fact, he said, 'I am short of money and I don't want to pay much,' so, we, of course, didn't spend an awful lot of time and I gave him what I think he wanted at that particular time. This was rather an unusual procedure for an appraisal."

I think I would agree it was a very unusual appraisal in every respect.

Mr. Dixon said in his opening statement, and he repeated to you in his summation of yesterday that there was no market for a plant of this kind, and that is the simple straightforward fact. The record shows why there was no market.

You will recall that Mr. Winckler during July and August of 1951 was trying to finance a defaulted RFC loan. [4551] You remember he said he went to the RFC and they said, "No, you don't

owe enough money. We can't refinance it because you don't owe enough money."

That was at a time when they had lost $150,000 and they had far more current liabilities than they had assets. But that wasn't the only effort he made.

He went to Hanson, the manager of the Bank of America out in Anaheim. Here is what Hanson said:

"Winckler approached us for a real estate loan to take up the RFC loan.

"Can you tell us what disposition was made of that application?

"It was rejected for two reasons. One, that it was a one-purpose building; second, that it was already in default."

There are two very good reasons why the building couldn't be refinanced. It didn't have economic value there to support the encumbrance that was already on it.

Mr. Walker as trustee, or is it receiver, in the Chapter X proceeding also tried to realize something from that plant. They tried to sell it in the citrus industry. They tried to sell it out of the citrus industry. And they could find no buyers.

Finally the plant was sold. It was sold to Rubin, the same Rubin—no, I guess the brother of the Rubin that was [4552] the lessor of the building before. It was sold to him for $100, and it was sold to him for that reason because Mr. Walker testified that it was subject to various encumbrances. The RFC loan was $50,500, and there was interest due on it.

There was a second deed to Mr. Parvin. Parvin was one of the stockholders, too, you remember, who was once the lessor under that lease-back arrangement. That is $57,000.

There were back taxes of $10,000. Withholding tax liens of 8,000.

Mr. Walker totaled them up and there was $150,000 encumbrance against the building. That is why they sold it for $100, because the building wasn't worth any more than $150,000 which had already been borrowed against it.

Now, I would like to talk about these various processing arrangements that you have heard so much about in the evidence. I want to give you a little resume of the reasons for entering into those arrangements, and what it is that justified those and how they happened to develop.

Sunkist as the co-operative marketing agency for these orange growers has three primary functions to serve. One, it sells oranges to be consumed as fresh fruit. That brings the highest return.

Next, it offers to sell product oranges to the independent producers of orange products of various kinds. That is the secondary market, we will [4553] say.

Following that, any surplus that remains is turned over to Exchange Orange Products Company for processing, and I want to show you why it is that these processing agreements are what Mr. Dixon called proper processing agreements, and that those which he says are proper are not the only proper ones, that the TreeSweet and the Silzle,

that type of processing agreement, participation agreement, is just as proper and is just as well suited to serve the ends of the growers when the market conditions are such that a processing arrangement is called for.

Mr. Armstrong testified to this effect.

Sunkist has had a general policy to encourage the independent processors and to supply them with raw material or fruit for their processing requirements. Sunkist started this policy and sold fruit to the independents as soon as they existed, which I guess would be some time in the 20's. Our preference was to sell to them.

Another policy Mr. Armstrong testified to was that:

It was and is the general policy of the Sunkist organization to utilize to the fullest possible extent the facilities of outside processing groups to the extent that we have fruit available for that purpose. The reason for that is that we wanted to take advantage of their own skills in [4554] manufacturing and in the development of new products and in the broadening of markets.

Mr. Finley is the man who as the manager of Orange Products Company implements and carries out these policies which are fixed by Sunkist. He told you what he did.

It was our board policy as the crop increased and the amount going to products, to use the present facilities of outside plants. A number of them wouldn't run the whole year, so we would use their equipment. Instead of leasing their plants or mak-

ing some other such arrangement, it seemed to work better to go to the custom packing or the grower participation methods, so it was the general policy at that time to hold down the Exchange Orange Products expansion and to use the existing facilities first.

Those are the policies.

Mr. Armstrong described how they were applied. He said this:

There are generally two categories of contracts, one, a participating type of contract, where the fruit was furnished by Exchange Orange, manufacturing costs furnished by the processor, and then they shared in the ultimate results of the sale on some basis which was worked out in an [4555] understanding. The other type was simply the hiring of facilities of outside processors to expand its own capacity which may be insufficient.

Mr. Finley testified before you twice. Twice he explained why it was and why it is that the processing contracts on this participating base came into being. He said as to the circumstances and reasons for working out the 1947 arrangement with Tree-Sweet, it was this:

About September, after he figured that he had packed enough, what he figured he could sell at the then going price, he decided that he did not want to pack anything for inventory. That is because in the fall of the year, if they are caught with inventory in California and if the Florida packers have a big crop or a surplus of competing juice, you will find that you have packed your in-

ventory on high fruit costs and you must sell it in competition with Florida at lower fruit costs. So McCracken had decided that TreeSweet was going to close down because they couldn't speculate on carrying this inventory.

What would that mean to the growers? It would mean that there would be fruit available for single-strength juice which might find a market later, price unknown, but if it wasn't processed right then, it would have to be washed down, [4556] whatever the phrase is.

So in order to prevent that and in order to help get more fruit to market in juice form, they entered into this grower participation plan. Finley said this is the plan:

The arrangement that was worked out first in 1947 was intended to and operated as a means of salvaging a portion of the orange crop to the growers, without the growers putting in a large capital investment.

Now, this is nothing peculiar in the Sunkist organization. It is nothing new. Morgan Ward testified on the subject. He said, "We had contracts like Exchange had, and Exchange had a deal the same as we had."

You will remember, I am sure, that Mr. Winckler in the crop year 1949 had one of these participating contracts, to which Mr. Dixon now objects. He had a contract with Morgan Ward, and the Morgan Ward contract was in every essential respect one of these participating contracts that they now say are violative of the Sherman Act. Well, they are

not violative of the Sherman Act. They are just good economics. They are just a way of salvaging a perishable crop.

Under the contract which Winckler-Smith had in 1949, Morgan Ward agreed that Morgan Ward would furnish Winckler & Smith with 60 per cent of all the products oranges and that those would be processed into juice and Winckler & [4557] Smith would not have to pay for the juice, they would put the goods in the warehouse, and then they would sell the goods, and when they sold them, then they would be paid for it out of the proceeds of the sale.

That is what Morgan Ward worked out with Winckler-Smith. It was a usual and customary operation.

Morgan Ward also testified he did just what Finley did in 1951 when he went to Case-Swayne. Remember now that Winckler-Smith had a single-strength participating contract with Morgan Ward in 1949, but in 1951 Morgan Ward went to Case-Swayne and he gave Case-Swayne his participating agreement and refused to give one to Winckler-Smith. Here is what Ward said about the circumstances leading up to that deal:

In 1951 we knew we would be faced with a lot of fruit, there being no home for it outside of Case-Swayne, Paramount, and a few small plants. I knew we were going to have, in order to get money from the fruit for the growers, going to have to enter into participating contracts in processing this fruit, not with one, but with several of these.

"The Court: You would have preferred to have sold your product oranges at $40 a ton?

"A. Absolutely. [4558]

"The Court: But when you couldn't do that, then you entered into the participating contracts that you have just described?

"The Witness: That is what I had to do to get rid of them."

Now, Morgan Ward had not one, he had several participating contracts in the year 1951. He had one with Paramount for frozen concentrate. He had one with Mr. Winckler for frozen concentrate. Then he had this other participating contract for the single-strength juice with Case-Swayne.

So I state to you that Morgan Ward, faced with the same problem that had faced Finley all the years, found exactly the same solution for it, a participating type of contract, and he entered into that, and that hurt Winckler-Smith, no doubt, but it is nothing that these defendants had anything to do with.

Would this be a good time for a short recess, your Honor?

The Court: I was just waiting for a good spot. We will take the recess now.

Remember the admonition of the court. The case is not yet submitted to you. Don't discuss and don't decide it.

You are excused for a short recess.

(Recess.) [4559]